DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 13-316

Title:	Kevin Loughrin, Petitioner v. United States
Docketed:	September 11, 2013
Lower Ct:	United States Court of Appeals for the Tenth Circuit
Case Nos.:	(11-4158)
Decision Date:	March 8, 2013
Rehearing Denied:	June 14, 2013

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Sep 9 2013	Petition for a writ of certiorari filed. (Response due October 11, 2013)
Oct 1 2013	Order extending time to file response to petition to and including November 12, 2013.
Nov 15 2013	Order further extending time to file response to petition to and including November 18, 2013.
Nov 18 2013	Brief of respondent United States in opposition filed.
Nov 25 2013	Reply of petitioner Kevin Loughrin filed.
Nov 26 2013	DISTRIBUTED for Conference of December 13, 2013.
Dec 13 2013	Petition GRANTED.
Jan 8 2014	SET FOR ARGUMENT ON Tuesday, April 1, 2014
Jan 14 2014	Record received from U.S.C.A. 10th Circuit, part of the record is electronic and located on PACER. The other part of the record received in one envelope is SEALED.
Jan 27 2014	Joint appendix filed.
Jan 27 2014	Brief of petitioner Kevin Loughrin filed.
Feb 3 2014	CIRCULATED.
Feb 3 2014	Brief amicus curiae of National Association of Criminal Defense Lawyers filed. (Distributed)
Feb 26 2014	Brief of respondent United States filed. (Distributed)
Mar 18 2014	Reply of petitioner Kevin Loughrin filed. (Distributed)
Apr 1 2014	Argued. For petitioner: Kevin K. Russell, Washington, D. C. For respondent: Anthony A. Yang, Assistant to the Solicitor General, Department of Justice, Washington, D. C.

PETITION FOR WRIT OF CERTIORARI

RECORD AND BRIEF

Supreme Court, U.S.
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No. 12-316

IN THE

Supreme Court of the United States

KEVIN LOUGHRIN,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

As the Tenth Circuit acknowledged in its decision below, the circuits are openly divided over the elements required to convict a defendant of federal bank fraud. The question presented is:

Whether the Government must prove that the defendant intended to defraud a bank and expose it to risk of loss in every prosecution under 18 U.S.C. § 1344.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Kevin Loughrin respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (Pet. App. 1a) is published at 710 F.3d 1111.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 2013. Pet. App. 1a. The court of appeals denied a timely petition for rehearing on June 14, 2013. Pet. App. 50a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The appendix to this brief reproduces the relevant portions of 18 U.S.C. §§ 1341, 1343, 1344, and 1346.

STATEMENT OF THE CASE

This case presents a recurring question upon which the courts of appeals are in open, acknowledged conflict: whether intent to defraud a bank and expose it to risk of loss is a required element in every prosecution under the federal bank fraud statute. While acknowledging that it took the minority view in the conflict, the Tenth Circuit affirmed the trial court's refusal to instruct the jury that intent to defraud a bank was required. In addition, the court upheld petitioner's bank fraud conviction even though the Government did not oppose petitioner's argument on appeal that there

was no evidence to support a finding that he intended to defraud a bank and the district court conclusively found that there was no evidence that any bank had been put at risk of loss.

1. Petitioner Kevin Loughrin admitted to local police that he engaged in a scheme to steal merchandise and cash from a local Target store. As part of his scheme, petitioner and an accomplice stole checks from the outgoing mail in people's mailboxes, altered them, and used the altered checks to purchase food and merchandise at Target. After stealing the checks, petitioner would erase or cross out the payee and write in "Target"; frequently, the original payee was still clearly visible. He similarly altered the payment amount. R. at 118-19.[1] On one occasion, petitioner presented two different checks, signed by two different people (one male and one female) to the same cashier who accepted both without question. R. at 209-11. After purchasing the merchandise, petitioner or his accomplice would immediately return it for cash, often without even leaving the store. R. at 119-20.[2]

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[1] "R." refers to Volume IV of the Record on Appeal, electronically filed on September 6, 2011 (Document No. 01018706266).

[2] The scheme went beyond altered checks. For example, petitioner looked for discarded receipts in the Target parking lot, then took the items listed on the receipts from store shelves and "returned" them for cash without ever making a purchase. 214 R. at 245. Petitioner also attempted to shoplift a Target display item by snipping the cord that attached it to the shelf. R. at 232.

After identifying petitioner and his accomplice as using altered checks in the store, Target began watching for their return. Eventually, a Target Loss Prevention Agent spotted petitioner and his accomplice and called the local police. Officers watched the pair unsuccessfully attempt to use an altered check. When confronted, petitioner admitted to the scheme. R. at 240-45.

In all, petitioner was charged with using six altered checks totaling $1,184.58. Indictment at 2. The trial court later found (and the Government did not contest on appeal) that there was never any risk that a bank, as opposed to Target, would end up suffering any financial loss as a result of the scheme. Pet. App. 37a. Target had chosen, as a matter of policy, not to train cashiers to detect or reject fraudulent checks. R. at 214. Instead, Target Loss Prevention Agents reviewed all checks later to identify and investigate any fraudulent activity. R. at 140. Under this system, most of the altered checks were identified by Target's fraud department and never submitted to a bank. R. at 140, 170, 207-09, 229-31. Moreover, a Government witness – a loss prevention specialist from one of the banks – testified that even if the bank had honored a check, the ultimate liability for the fraudulent check would have fallen on Target, not the bank. R. at 165.

2. Petitioner was indicted by the United States and, as relevant here, was charged with six counts of violating 18 U.S.C. § 1344. The statute provides:

> **Bank fraud**
>
> Whoever knowingly executes, or attempts to execute, a scheme or artifice –

> (1) to defraud a financial institution; or
>
> (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises.

18 U.S.C. § 1344.[3]

At the close of the Government's case, petitioner moved for a Rule 29 judgment of acquittal based on insufficiency of the evidence. Pet. App. 35a. The court granted the motion in part. *Id.* The court explained that under Tenth Circuit precedent, the federal bank fraud provision creates two different crimes with different elements. The first subsection of Section 1344 – which criminalizes attempts to "defraud a financial institution" – requires proof of an intent to defraud the bank, and therefore, proof that the scheme put the bank at risk of loss. Pet. App. 36a (citing *United States v. Sapp*, 53 F.3d 1100 (10th Cir. 1995)). Finding that "[t]here's simply nothing to show risk of loss or putting a bank, a financial institution, at risk" in this case, Pet. App. 37a, the court held that there was insufficient evidence for conviction under Section 1344(1), Pet. App. 35a-38a. However, the court permitted the Government to proceed under subsection (2), which, the court concluded, establishes a separate offense that

---

[3] Petitioner was also charged with two counts of aggravated identity theft under 18 U.S.C. § 1028A, and one count of possession of stolen mail under 18 U.S.C. § 1708.

dispenses with the risk of loss element. Pet. App. 36a.

At the close of evidence, petitioner requested a jury instruction requiring the Government prove he acted with "intent to defraud a *financial institution*," Pet. App. 43a (emphasis added), and to cause some "financial loss *to a financial institution*," Pet. App. 45a (emphasis added). The judge refused. Pet. App. 43a, 45a-46a. Pointing to Tenth Circuit precedent and the Circuit's pattern instructions, the court held that while subsection (1) required intent to defraud a bank, "there is no intent to defraud the institution" required under subsection (2). Pet. App. 43a-46a. Therefore it would be sufficient if the prosecution proved that petitioner was "deceiving some others," even if he never intended to defraud a bank. Pet. App. 46a. Accordingly, the jury was instructed simply that petitioner must have "acted with intent to defraud." Jury Instructions No. 17.

In the Government's closing, the prosecutor elected not to contest petitioner's evidence that he never intended to defraud the bank. Instead, the prosecutor emphasized that such intent was not required under the jury instruction given:

> You might recall that he said he was hoping to take money from Target. He wanted to defraud Target, not a bank. That doesn't matter. That's also not in your instructions. The instructions say that he had to have the intent to defraud. He had to have a fraudulent intent. He did not have to intend to defraud the bank. He did not have to have a scheme to defraud the bank.

R. at 317.

The jury found petitioner guilty on all counts. Pet. App. 23a. After the verdict, petitioner renewed his motion for judgment of acquittal, R. at 169, which the court summarily denied, R. at 180.

3. On appeal petitioner challenged the trial court's denial of his proposed jury instructions on intent and his Rule 29 motions. Pet. App. 3a. The Tenth Circuit affirmed. *Id.* 2a.

The court of appeals did not question that petitioner intended only to defraud Target. Pet. App. 6a. Likewise, neither the court of appeals, nor the Government, contested the trial court's finding that there was insufficient evidence to show that petitioner intended to expose a bank to any risk of loss. Pet. App. 3a-7a. But the court ultimately held, in acknowledged conflict with other circuits, that neither was required to secure a conviction under Section 1344.

The court agreed that to convict a defendant under Section 1344(1), the government must prove intent to defraud a financial institution, and that this requires showing that a financial institution was put at risk of loss by the scheme. Pet. App. 4a. But the court reaffirmed its prior holding that Section 1344's two subsections establish "separate offenses." Pet. App. 4a (quoting *United States v. Swanson*, 360 F.3d 1155, 1162 (10th Cir. 2004)). And "a conviction under § 1344(2) requires no proof that a bank was 'at risk' because there is no explicit requirement that a particular bank be defrauded." Pet. App. 5a (quoting *Sapp*, 53 F.3d 1100, 1103 (10th Cir. 1995)). Instead "only an intent to defraud *someone* is required." Pet.

App. 6a (citing *United States v. Rackley*, 986 F.2d 1357, 1360-61 (10th Cir. 1993)). Accordingly, the court held that the jury instructions were correct as given and that there was sufficient evidence to support petitioner's conviction. Pet. App. 6a.

The court acknowledged that although its interpretation was consistent with the law of the Sixth Circuit, it was in conflict with decisions from the First, Second, and Third Circuits. Pet. App. 6a-7a n.1. The court further recognized that by dispensing with the requirement that a defendant intend to defraud a bank, its interpretation of Section 1344 "cast a wide net," *id.* 7a, that "creates bank fraud liability for any fraudulent scheme as long as a bank's assets are somehow involved," *id.* 6a. But the panel believed that its holding was required by circuit precedent absent *en banc* reconsideration or a contrary decision of this Court. Pet. App. 6a-7a.

The full court subsequently denied a petition for rehearing en banc. Pet. App. 50a.

REASONS FOR GRANTING THE WRIT

"Although § 1344 has produced much litigation in the Circuits and many separate opinions by learned appellate judges, federal courts do not agree on the mental state necessary to support a conviction under § 1344 . . . ." *United States v. Nkansah*, 699 F.3d 743, 762 (2d Cir. 2012) (Lynch, J., concurring). Given the seriousness of the offense and the frequency with which it is prosecuted, that division should not endure. This case presents an ideal vehicle for the Court to finally resolve it.

I. The Courts Of Appeals Are Openly And Intractably Divided Over Section 1344's Intent Requirement.

The conflict over the nature of the intent requirement under Section 1344 is longstanding and widely acknowledged. *See, e.g.*, *United States v. Thomas*, 315 F.3d 190, 196 (3d Cir. 2002) ("The Courts of Appeals are not of one mind as to the proper reading of the statute, including . . . the intent requirement . . . ."); *United States v. Everett*, 270 F.3d 986, 990 (6th Cir. 2001) ("The Circuits are not in accord as to the intent required to violate § 1344."); *United States v. Kenrick*, 221 F.3d 19, 27 (1st Cir. 2000) (en banc) ("There is also no consensus among the circuits on the issue."), *cert. denied*, 531 U.S. 961 (2000); *United States v. Staples*, 435 F.3d 860, 866-67 (8th Cir. 2006) (detailing the circuit conflict).

Specifically, although the circuits widely agree that under the first subsection of Section 1344, the Government must prove the defendant intended to defraud a bank and expose it to a risk of loss, they are openly divided over whether the Government can

avoid that burden by charging the defendant under Section 1344(2).

A. The Circuits Are Divided Six-To-Three.

1. Six circuits have held that Section 1344's intent element imposes upon the Government two related requirements. First, these courts hold that the Government must prove that the defendant intended to defraud a covered financial institution; it is not enough that the defendant intended to defraud a non-bank victim even if a bank was involved in the scheme in some way. Second, these circuits hold that to prove intent to defraud a bank, the Government must show that the defendant's scheme exposed the bank to a risk of loss; it is insufficient that a defendant lied in some way to a bank if he did not intend to expose the bank (as opposed to some other victim) to a risk of financial harm. Moreover, in conflict with the decision below, these courts hold that both of these elements are required whether the Government charges the defendant under subsection (1) or (2).

- **First Circuit**: *United States v. Kenrick*, 221 F.3d 19, 29 (1st Cir. 2000) (en banc) (Government must prove, "under either subsection[,] an intent to deceive a bank in order to obtain from it money or other property"), *cert. denied*, 531 U.S. 961 (2000); *United States v. Ayewoh*, 627 F.3d 914, 921-22 (1st Cir. 2010) (Government must show "defendant knowingly . . . exposed a . . . bank to a risk of loss") (internal citations omitted, emphasis omitted), *cert. denied*, 132 S. Ct. 141 (2011);

- **Second Circuit:** *United States v. Nkansah*, 699 F.3d 743, 748 (2d Cir. 2013) ("Appellant is correct that the bank fraud statute is not an open-ended, catch-all statute encompassing every fraud involving a transaction with a financial institution. Rather, it is a specific intent crime requiring proof of an intent to victimize a bank by fraud."); *United States v. Rodriguez*, 140 F.3d 163, 167 n.2 (2d Cir. 1998) ("Regardless of whether a defendant is charged under 18 U.S.C. § 1344(1) or (2) . . . the government must show that the defendant engaged in a pattern of deceptive conduct designed to deceive a federally chartered or insured financial institution."); *United State v. Blackmon*, 839 F.2d 900, 906 (2d Cir. 1988) ("Where the victim is not a bank and the fraud does not threaten the financial integrity of a federally controlled or insured bank, there seems no basis in the legislative history for finding coverage under section 1344(a)(2).");
- **Third Circuit:** *United States v. Thomas*, 315 F.3d 190, 197 (3d Cir. 2002) ("[T]he *sine qua non* of a bank fraud violation, no matter what subdivision of the statute it is pled under, is the intent to defraud the bank."); *id.* at 200 (however charged, Government must prove that "harm or loss to the bank [was] contemplated by the wrongdoer to make out a crime of bank fraud."); *id.* at 196 (noting that a contrary interpretation would give the statute "a breadth of scope that extends well beyond what Congress intended the statute to

regulate" because it would have "only the most tenuous nexus between the scheme or artifice and the institution of banking"); *see also* United States Court of Appeals, Third Circuit, *Model Criminal Jury Instructions* § 6.18.1344 (Dec. 2012) (requiring Government to prove in every Section 1344 prosecution that that the defendant acted "with the intent to defraud (name of *financial institution*)") (emphasis added);

- **Fifth Circuit:** *United States v. Morganfield*, 501 F.3d 453, 465 (5th Cir. 2007) (in Section 1344(2) case, holding that when the defendant targets third parties, prosecution must present facts "evincing an intent to victimize the financial institution to sustain a bank fraud charge under § 1344") (citation omitted), *cert. denied*, 553 U.S. 1067 (2008); *United States v. Sprick*, 233 F.3d 845, 852 (5th Cir. 2000) (Under Section 1344(2), Government "must show not only that the money or assets in the custody or control of a financial institution were obtained by means of fraud but also that doing so placed the financial institution at risk of civil liability"); *see also* Committee on Pattern Jury Instructions, Fifth Circuit, *Pattern Jury Instructions (Criminal Cases)* § 2.61 (2012) (instruction for 18 U.S.C. § 1344(2)) (requiring jury to find that "the defendant acted with a specific intent to defraud (name *bank*)" and "[t]hat the defendant placed the financial institution at risk of civil liability or financial loss") (emphasis added);

- **Seventh Circuit:** *Bressner v. Ambroziak*, 379 F.3d 478, 482 (2004) ("An essential element of bank fraud is 'intent to deceive *a bank* in order to obtain from it money or other property.'") (quoting *United States v. Lane*, 323 F.3d 568, 583 (7th Cir. 2003) (citing *Kenrick*, 221 F.3d at 545)) (emphasis in original); *United States v. Davis*, 989 F.2d 244, 247 (7th Cir. 1993) (reversing bank fraud conviction for IRS tax refund scheme because although the defendant "may well have committed fraud against the Internal Revenue Service," he did not scheme to defraud the bank because there was "no way in which the fraud could have endangered the" bank); *id.* at 247 ("[T]he purpose of [§ 1344] is . . . the federal government's interest as an insurer of financial institutions.").

Courts relying on this rule have overturned convictions when, as in this case, a defendant intended to defraud a third party (not a bank), in a way that involved a financial institution but did not expose it to a risk of loss. In *United States v. Rodriguez*, 140 F.3d 163, 167 n.2 (2d Cir. 1998), for example, the Second Circuit vacated the bank fraud conviction of a defendant who had engaged in a scheme to defraud a publishing company by obtaining checks for services she never performed. The defendant's friend, a senior accounts clerk at the company, submitted phony invoices for the defendant. When the company paid the invoices, the defendant deposited the checks at an FDIC-insured bank. In vacating the conviction, the Second Circuit

held that it was not enough that the defendant may have intended to defraud the publishing company through a scheme that involved checks or deposits to a bank. 140 F.3d at 166-67. The court reasoned that the purpose of the statute is to "protect[] the federal government's interest" in the "financial integrity" of federally insured or federally related financial institutions. *Id.* When the target of the scheme is not a bank, and where the scheme does not expose any bank to a risk of loss, the purpose of the statute is not implicated. *Id.*

Likewise, in *United States v. Odiodio*, 244 F.3d 398 (5th Cir. 2001), the Fifth Circuit reversed the conviction of a defendant who, like petitioner, altered checks stolen from the mail and presented them to a securities brokerage (which is not considered a "financial institution" within the meaning of the bank fraud statute) to convert them into cash. The Fifth Circuit held that the scheme did not amount to federal bank fraud even if the brokerage eventually deposited the checks into a covered bank. The court reasoned that "as the entity that initially received the altered instrument," the brokerage "bore the full risk of loss in this case." *Id.* at 402.

The Eighth Circuit reached the same conclusion in *United States v. Staples*, 435 F.3d 860 (8th Cir. 2006), *cert. denied*, 549 U.S. 862 (2006). There, the defendants altered the amount on cashier's checks before passing them to title insurance companies in connection with real estate transactions. The title insurance companies would deposit the altered checks and then issue their own legitimate checks to the property sellers, who were in on the scheme. By the time the title insurance company discovered that

the checks were altered and thus not collectible, the defendants had already cashed the company's checks. 435 F.3d at 862-63. Although, as in this case, the defendants used altered checks as part of a scheme to defraud, the Eighth Circuit nonetheless reversed. Disagreeing with the interpretation of Section 1344(2) adopted by the Tenth Circuit, the Eighth Circuit held that "the evidence [was] insufficient, because there was no loss, or attempt to cause a loss, to a financial institution." *Staples*, 435 F.3d at 867.

2. The Sixth, Ninth, and Tenth Circuits disagree. Those courts have held that Section 1344(2) establishes an independent crime that dispenses with any requirement to prove intent to defraud a bank or expose it to a risk of loss. Instead, Section 1344(2) requires only intent to defraud *someone* and some nexus between the fraudulent scheme and a financial institution.

In this case, for example, the Tenth Circuit held that although Section 1344(1) requires an intent to defraud a bank, and that this requires proof of risk of loss to the bank, Section 1344(2) establishes an independent crime that does not require intent to defraud a bank and, therefore, no risk of harm either. *See* Pet. App 5a-6a ("[U]nder our precedent, an individual can violate § 1344(2) by obtaining money from a bank while intending to defraud *someone else*.") (emphasis added); *id.* 5a ("[A] conviction under § 1344(2) requires no proof that a bank was 'at risk' because there is no explicit requirement that a particular bank be defrauded."); *id.* 6a ("Proving risk of loss to a bank is sensible when the target of the fraud must be a bank; yet when no risk of loss is required, it would be incongruous to still require that

the target be a bank."). According to the Tenth Circuit, the language of Section 1344(1) focuses "on the conduct as it affects the financial institution," while Section 1344(2) "emphasizes the conduct of the defendant." Pet. App. 5a.

In so holding, the Tenth Circuit embraced the reasoning of the Sixth Circuit, which likewise views subsection (2) as establishing a separate crime requiring neither intent to defraud a bank nor risk of loss to the bank. *See United States v. Everett*, 270 F.3d 986, 991 (6th Cir. 2001) ("[T]he defendant need not have put the bank at risk of loss in the usual sense or intended to do so."), *cert. denied*, 537 U.S. 828 (2002). *Everett*, like the Second Circuit's contrary decision in *Rodriguez*, involved a bookkeeper who caused valid checks to be issued without the account holder's permission. In *Everett*, the defendant was an accountant who signed checks to herself from her client without authorization. Acknowledging that the evidence indicated the defendant intended only to defraud her client but not to put the bank at any risk, the court held that "minimal involvement of the bank . . . is all that is required, if the specific intent to defraud someone is present." *Id.* at 991. Thus, in the Sixth Circuit, "the bank fraud statute is violated, even if the intended victim of the fraudulent activity is an entity other than a federally insured financial institution, when the fraudulent activity causes the bank to transfer funds." *United States v. Reaume*, 338 F.3d 577, 581 (6th Cir. 2003), *cert. denied*, 540 U.S. 1166 (2004).

The Ninth Circuit has likewise concluded that "[a]ll the statute facially seems to require in a case involving property in the custody or control of a bank,

is that there be an attempt to obtain such property from the bank by deceptive means." *United States v. McNeil*, 320 F.3d 1034, 1037 (9th Cir. 2003), *cert. denied*, 540 U.S. 842 (2003). Thus, the Ninth Circuit has rejected the claim that Congress "intend[ed] to limit the reach of § 1344(2) to cases in which a bank is put at risk of loss." *Id.* at 1038; *see also United States v. Rizk*, 660 F.3d 1125, 1135 (9th Cir. 2011) ("This circuit 'has never adopted a risk of loss analysis in bank fraud cases.'") (quoting *United States v. Wolfswinkel*, 44 F.3d 782, 786 (9th Cir. 1995)).

3. The differing legal standards regularly lead to opposite results in factually similar cases.

As noted above, the Second and Sixth Circuits have reached opposite outcomes in cases involving employees defrauding their employers by causing valid checks to be issued to themselves or their friends.

The Seventh and Ninth Circuits have also reached opposite outcomes in cases involving schemes to fraudulently obtain IRS tax refunds that were deposited into bank accounts opened using false information. The Seventh Circuit in *Davis* reversed the conviction, reasoning that the bank was not at risk of loss or civil liability because the IRS refund checks were valid and, therefore, held by the bank as a holder in due course. 989 F.2d at 246. While Judge Posner acknowledged that the defendant may have committed tax fraud, he wrote, "only in the most literal, hypertechnical sense could he be said to have schemed to defraud the *bank*." *Id.* Conversely, in *McNeil*, the Ninth Circuit expressly "disagree[ed] with the contrary conclusion reached by the Seventh

Circuit" in *Davis*. *McNeil*, 320 F.3d at 1037. As in *Davis*, the defendant in *McNeil* fraudulently obtained an IRS tax refund and deposited it into an account opened under another person's name. The court recognized that the two cases were "factually similar," *id.*, but affirmed the conviction because it found that Congress did not intend to limit the statute to "cases in which a bank is put at risk of loss," *id.* at 1038.

There likewise can be no question that petitioner's case would have come out differently if it had been prosecuted in one of the circuits adopting the majority position on Section 1344's intent requirement. In similar circumstances, the Fifth and Eighth Circuits have overturned convictions of defendant who, although using altered checks, passed the checks to non-bank third parties in schemes intended only to defraud the direct victim and in which the Government failed to prove any risk of loss to a financial institution. *See Odiodio*, 244 F.3d at 402; *Staples*, 435 F.3d at 867.

B. The Conflict Between The Courts Of Appeals Is Entrenched, Persistent, And Unlikely To Benefit From Further Percolation.

The circuit conflict will not be resolved without this Court's intervention, and further delay will serve no purpose.

Even though aware of other circuits' contrary decisions, the courts of appeals have persisted in their conflicting interpretations. *See United States v. Warshak*, 631 F.3d 266, 313 (6th Cir. 2010) (acknowledging contrary law of other circuits, but

concluding that "the state of the law is different in this circuit"); *Thomas*, 315 F.3d at 198-99 n.2 (expressly rejecting the Sixth Circuit's construction of Section 1344 for its "broad sweep"); *see also McNeil*, 320 F.3d at 1037; Pet. App. 6a.

Nor is there any movement toward a consensus position – to the contrary, the split has only widened as new courts have weighed in on the question. *See, e.g.*, *United States v. Laljie*, 184 F.3d 180, 189 (2d Cir. 1999) (intent to defraud a bank required); *Kenrick*, 221 F.3d at 29 (1st Cir. 2000) (same); *Everett*, 270 F.3d at 991 (6th Cir. 2001) (intent to defraud a bank not required); *Thomas*, 315 F.3d at 200 (3d Cir. 2002) (required); *McNeil*, 320 F.3d at 1039 (9th Cir. 2002) (not required).

Nor would further percolation benefit this Court. The question has been thoroughly ventilated in reasoned opinions by nine of the thirteen courts of appeals. There is little basis to expect that further decisions will meaningfully contribute to the debate.

II. The Question Presented Arises Frequently And Determines The Outcome Of Many Federal Criminal Prosecutions.

1. Certiorari is further warranted because the intent required under the bank fraud statute is a question of recurring importance to the proper disposition of a frequently prosecuted federal crime.

Bank fraud under Section 1344 is one of the most frequently prosecuted federal property crimes. Between 2006 and 2010, the Government filed nearly

3,000 cases of criminal bank fraud in the district courts – far more than either mail or wire fraud.[4] These prosecutions gave rise to more than 125 appeals in 2010 alone.[5]

It is thus unsurprising that Section 1344's intent requirement has been the subject of frequent litigation in the courts of appeals. *See, e.g., United States v. Ayewoh*, 627 F.3d 914, 921-22 (1st Cir. 2010), *cert. denied*, 132 S.Ct. 141 (2011); *United States v. Edelkind*, 467 F.3d 791, 797-98 (1st Cir. 2007), *cert. denied*, 549 U.S. 1326 (2007); *United States v. Kenrick*, 221 F.3d 19, 26-29 (1st Cir. 2000) (en banc), *cert. denied*, 531 U.S. 961 (2000); *United States v. Nkansah*, 699 F.3d 743, 747-51 (2d Cir. 2012); *United States v. Laljie*, 184 F.3d 180, 189-91 (2d Cir. 1999); *United States v. Morgenstern*, 933 F.2d 1108, 1113-14 (2d Cir. 1991), *cert. denied*, 502 U.S. 1101 (1992); *United States v. Blackmon*, 839 F.2d 900, 904-07 (2d Cir. 1988); *United States v. Thomas*, 315 F. 3d 190, 195-99 (3d Cir. 2002); *United States v. Brandon*, 298 F.3d 307, 310-12 (4th Cir. 2002); *United States v. Celesia*, 945 F.2d 756, 758-60 (4th Cir. 1991); *United States v. Orr*, 932 F.2d 330, 332 (4th Cir. 1991); *United States v. Morganfield*, 501 F.3d 453, 461-68 (5th Cir. 2007), *cert. denied*, 553 U.S. 1067 (2008); *United States v. McCauley*, 253 F.3d 815, 818-21 (5th Cir. 2001); *United States v. Odiodio*, 244 F.3d 398, 400-02 (5th Cir. 2001); *United*

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[4] James C. Duff, Admin. Office of the U.S. Courts, 2010 Annual Report of the Director: Judicial Business of the United States Courts 222 tbl.D-2 (2011).

[5] *Id.* at 125 tbl.B-7.

States v. Sprick, 233 F.3d 845, 852-53 (5th Cir. 2000); *United States v. Warshak*, 631 F.3d 266, 312-13 (6th Cir. 2010); *United States v. Reaume*, 338 F.3d 577, 580-82 (6th Cir. 2003), *cert. denied*, 540 U.S. 1166 (2004); *United States v. Everett*, 270 F.3d 986, 989-91 (6th Cir. 2001), *cert. denied*, 537 U.S. 828 (2002); *United States v. Stone*, 954 F.2d 1187, 1189-91 (6th Cir. 1992); *United States v. LeDonne*, 21 F.3d 1418, 1425-28 (7th Cir. 1994), *cert. denied*, 513 U.S. 1020 (1994); *United States v. Davis*, 989 F.2d 244, 246-47 (7th Cir. 1993); *United States v. Doherty*, 969 F.2d 425, 427-30 (7th Cir. 1992), *cert. denied*, 506 U.S. 1002 (1992); *United States v. Staples*, 435 F.3d 860, 865-68 (8th Cir. 2006), *cert. denied*, 549 U.S. 862 (2006); *United States v. Ponec*, 163 F.3d 486, 487-89 (8th Cir. 1998); *United States v. McNeil*, 320 F.3d 1034, 1037-40 (9th Cir. 2002), *cert. denied*, 540 U.S. 842 (2003); *United States v. McDonald*, 209 Fed. Appx. 748, 750-52 (10th Cir. 2006); *United States v. Sapp*, 53 F.3d 1100, 1102-03 (10th Cir. 1995), *cert. denied*, 516 U.S. 1082 (1996); *United States v. De La Mata*, 266 F.3d 1275, 1298-99 (11th Cir. 2001), *cert. denied*, 535 U.S. 989 (2002); *United States v. Hubbard*, 889 F.2d 277, 280 (D.C. Cir. 1989).[6]

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[6] The statute's intent requirement has also been the subject of frequent litigation in the trial courts. *See, e.g., United States v. Whaley*, No. 3:10-CR-169, 2012 WL 1193352, at *8-*13 (E.D. Tenn. Mar. 5, 2012); *United States v. Rice*, No. 1:11-CR-15, 2011 WL 3841973, at *1-*3 (E.D. Tenn. Aug. 30, 2011); *United States v. Hergert*, No. 4:09CR3019, 2010 WL 5644670, at *13-*15 (D. Neb. Dec. 30, 2010); *United States v. Rivera*, No. CR 209-014, 2010 WL 114881, at *2-*6 (S.D. Ga. Jan. 12, 2010); *Brewster v. McNeil*, 720 F. Supp. 2d 1369, 1371-75 (S.D. Fla.

Moreover, the frequency of bank fraud charges acquires additional importance because Section 1344 is a predicate offense for a number of other federal crimes, such as aggravated identity theft and racketeering. *See* 18 U.S.C. § 1028A; 18 U.S.C. § 1961(1). In this case, for example, bank fraud was the only predicate act for petitioner's aggravated identity theft conviction. *See* 18 U.S.C. § 1028A(c).

Such an important and consequential criminal statute should have the same meaning throughout the country. Yet, as it stands, many defendants are convicted of a serious federal felony solely because of the happenstance of the circuit in which they were prosecuted.

2. The question presented is also important because it implicates the delicate division of criminal jurisdiction between state and federal governments. As several circuits have noted, a broad construction of Section 1344 threatens to federalize a wide range of criminal conduct traditionally left to the states to regulate and punish. *See, e.g., Thomas*, 315 F.3d at 199 ("The extension proposed here by the Government offends the balance of federal and state jurisdiction and our principles of comity by imposing federal law where the federal interest is remote and attenuated.").

2009); *United States v. Royston*, 184 F. Supp. 2d 517, 519-22 (W.D. Va. 2002); *United States v. Antonelli*, No. 97 CR 194, 1997 WL 672245, at *1-*2 (N.D. Ill. Oct. 27, 1997).

III. This Case Presents The Ideal Vehicle For Resolving The Circuit Split.

This case presents the ideal vehicle for resolving the circuit conflict over Section 1344's intent requirement.

The question presented was squarely addressed by the court of appeals. *See* Pet. App. 3a-7a. Moreover, the court's answer to the question was outcome determinative. On appeal, the Government did not oppose petitioner's argument that there was no evidence to support a finding that petitioner intended to defraud a bank. *See* Petr. C.A. Br. § II.B; U.S. C.A. Br. § II (arguing only that jury was properly instructed that intent to defraud a bank was not required). Moreover, the district court conclusively found that there was no evidence that any bank had been put at risk of loss. *See id.* 19; Pet. App. 35a-38a. The Tenth Circuit upheld petitioner's conviction only because it construed Section 1344(2) to require "only an intent to defraud *someone*," Pet. App. 5a.

Consequently, this case does not present any of the vehicle problems the Solicitor General identified in opposing earlier petitions in bank fraud cases raising similar questions. *See, e.g.*, Brief for the United States in Opposition at 17, *United States v. Leahy*, 445 F.3d 634 (2006) (No. 06-71, 06-79), 2006 WL 3016309 (arguing that the case was a poor vehicle because the bank was the direct target of the fraud); Brief for the United States in Opposition at 5, *United States v. Sanders*, 59 Fed. Appx. 765 (6th Cir. 2003) (No. 03-304), 2003 WL 22471180 (same); Brief for the United States in Opposition at 13-14, 15,

United States v. Whitmore, 35 Fed. Appx. 307 (9th Cir. 2002) (No. 02-126), 2002 WL 32134864 (arguing that the case was a poor vehicle because issue was not preserved below and resolution of the question would not be outcome determinative).

IV. The Tenth Circuit Has Wrongly Interpreted The Federal Bank Fraud Statute.

The Tenth Circuit acknowledged that under the first subsection of Section 1344, the Government must prove the defendant intended to defraud a bank and expose it to a risk of loss. Pet. App. 4a. Nevertheless, it relieved the Government of that burden in this case because it believed that the second subsection of the provision establishes an independent crime requiring no intent to defraud a bank. That conclusion is incorrect. The majority of circuits have correctly concluded that intent to defraud a bank and expose it to a risk of loss is necessary in every bank fraud prosecution.

1. As this Court has explained, Congress enacted the bank fraud statute in response to recent decisions from this Court that had shown gaps in laws covering frauds victimizing financial institutions.[7] The provision, thus, was designed to "provide an effective

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[7] Specifically, in *Williams v. United States*, 458 U.S. 279 (1982), the Court held that a defendant could not be prosecuted for check-kiting under 18 U.S.C. §1014 because a check was not a false statement, as required by that statute. *Id.* at 284. Earlier, in *United States v. Maze*, 414 U.S. 395 (1974), the Court held that a scheme to defraud a bank did not constitute mail fraud unless the success of the scheme depended on the use of the mails. *Id.* at 402.

vehicle for the prosecution of frauds in which the *victims are financial institutions* that are federally created, controlled or insured," S. Rep. No. 98-225, at 377 (1983) (emphasis added). That purpose of protecting the financial integrity of banks is reiterated throughout the legislative history.[8]

The statute's text thus reflects that Section 1344 was intended to federalize fraudulent schemes only to the extent they intentionally targeted a bank and put its assets at risk. Beginning with the title, Congress made clear that Section 1344 as a whole is directed at "Bank Fraud," not "obtaining money from a bank while intending to defraud someone else," Pet. App. 5a-6a. The statute then provides that the Government must prove in every Section 1344 prosecution that the defendant "*knowingly* execute[d], or attempt[ed] to execute, a scheme or artifice" to either "defraud *a financial institution*" or to obtain the property "owned by, or under the custody or control of, *a financial institution*." 18

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[8] *See, e.g., id.* at 378 ("[I]n the proposed offense, jurisdiction is based on the fact that the victim of the offense is a federally controlled or insured institution."); *see also* H.R. Rep. No. 98-901, at 4 (1984) (explaining that the proposed bill "enacts a new section to address schemes to defraud financial institutions"); *Financial Bribery and Fraud Amendments Act of 1984 and Parts E, F, and G of Title XI of S. 1762, Comprehensive Crime Control Act of 1984: Hearing on H.R. 5405 Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary*, 98th Cong. 12 (1984) (statement of Victoria Toensing, Deputy Assistant Att'y Gen. of the United States) ("What is needed . . . is a separate Federal statute, similar to the mail and wire fraud statutes, making it an offense to defraud a federally chartered or insured financial institution.").

U.S.C. §§ 1344(1), (2) (2006) (emphasis added). The defendant must, accordingly, know that the object of his scheme is property that is either owned by, or in the custody of, a bank. *See Flores-Figueroa v. United States*, 556 U.S. 646, 650-52 (2009) (holding that the word "knowingly" applies to all subsequent elements of a criminal statute). Requiring proof of intent to defraud a bank ensures that the Government establishes, as required by the text, that the defendant knew that he was scheming to obtain the property of a bank (or property in its custody), rather than simply the property of "someone else." Pet. App. 5a-6a.

The Tenth Circuit's contrary construction gives the statute a breadth far in excess of what is necessary to accomplish Congress's purpose of protecting the financial integrity of federally related financial institutions. Furthermore, the Tenth Circuit's interpretation federalizes broad swaths of traditional state crimes, like the simple fraud and theft alleged here, simply because they have some nexus to a federally related bank. But this Court "will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction." *United States v. Bass*, 404 U.S. 336, 349 (1971); *see also, e.g., Scheidler v. Nat'l Org. for Women, Inc.*, 547 U.S. 9, 20 (2006) (rejecting an interpretation because "[i]t would federalize much ordinary criminal behavior . . . that typically is the subject of state, not federal, prosecution"). If "Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language

of the statute.'" *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991) (citations omitted). There is no such unambiguous statement in Section 1344(2).

Moreover, the Tenth Circuit's interpretation is inconsistent with this Court's repeated reliance, in construing the scope of federal fraud statutes, on the venerable principle that "when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." *McNally v. United States*, 483 U.S. 350, 359-60 (1987); *see also Skilling v. United States*, 130 S. Ct. 2896, 2932-33 (2010) (applying rule of lenity in mail fraud case); *Cleveland v. United States*, 531 U.S. 12, 25 (2000) (same); *Williams v. United States*, 458 U.S. 279, 290 (1982) (applying rule of lenity in alleged bank fraud case under different statute).

2. The Tenth Circuit nonetheless believed that its interpretation was necessary to ensure that subsections (1) and (2) would be given separate meaning as independent offenses. Pet. App. 4a; *see also United States v. Bonnett*, 877 F.2d 1450, 1453 (10th Cir. 1989). But that reasoning fails to account for the history of Section 1344's divided structure and this Court's decisions construing the nearly identically worded mail and wire fraud statutes upon which Section 1344 was based.

a. The language and structure of Section 1344 was borrowed nearly verbatim the pre-existing mail and wire fraud statutes. *See Neder v. United States*, 527 U.S. 1, 20-21 (1999). At the time, the mail fraud statute provided, in relevant part:

> **Frauds and swindles**
>
> Whoever, having devised or intending to devise any scheme or artifice [1] to defraud, or [2] for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . .

18 U.S.C. § 1341 (1982). The wire fraud statute had identical language. *See* 18 U.S.C. § 1343 (1982). In enacting Section 1344, Congress used the same disjunctive language, but made clear that the object of the scheme must be a bank or property in its custody:

> **Bank fraud**
>
> (a) Whoever knowingly executes, or attempts to execute, a scheme or artifice–
>
> (1) to defraud a *federally chartered or insured financial institution*; or
>
> (2) to obtain any of the moneys, funds, credits, assets, securities or other property owned by or under the custody or control of a *federally chartered or insured financial institution* by means of false or fraudulent pretenses, representations, or promises . . . .

Comprehensive Crime Control Act of 1984, Pub. L. 98-473, Title II, § 1108(a), 98 Stat. 1976, 2147 (codified as amended at 18 U.S.C. § 1344) (emphasis added).

b. In interpreting the language common to all three fraud statutes, this Court has acknowledged that "[b]ecause the two phrases identifying the proscribed schemes" – that is, the two phrases that became subsections (1) and (2) of the bank fraud statute – "appear in the disjunctive, it is arguable

that they are to be construed independently," *McNally*, 483 U.S. at 358. On that view, the Government could avoid the intent requirements of one clause by proceeding under the other. But this Court has consistently refused to give the Government that power, instead finding that the disjunctive phrasing creates a single offense, with the second clause merely serving to clarify the scope of the first. *Id.* at 358-59.

This Court reached that conclusion based on the history of the mail and wire fraud statutes. As originally enacted in 1872, the mail fraud statute contained only the first clause, prohibiting the use of the mails in furtherance of "any scheme or artifice to defraud." *McNally*, 483 U.S. at 356. The Court interpreted that clause in *Durland v. United States*, 161 U.S. 306 (1896), as extending beyond the common law crime of false pretenses, reaching "everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future." 161 U.S. at 313.[9] Congress then amended the statute to add the second clause, "or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." Act of Mar. 4, 1909, ch. 321, § 215, 35 Stat. 1088, 1130.

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[9] The petitioner in *Durland* was convicted for a scheme to sell bonds by promising significant returns, a promise petitioner never intended to honor. 161 U.S. at 509. Arguing that fraud was limited to false statements about the past or present, petitioner asserted he could not be liable for promises as to the future. *Id.*

As the Tenth Circuit did here, lower courts inferred from the statutes' new disjunctive phrasing that Congress intended the two clauses to be "construed independently." *McNally*, 483 U.S. at 358.[10] But this Court rejected that reasoning. Instead, the Court found that Congress added the second clause to "codif[y] the holding of *Durland*." *McNally*, 483 U.S. at 357-58. "As we see it," the Court explained, "adding the second phrase simply made it unmistakable that the statute reached" the conduct the Court had already held encompassed by the first clause. *Id.* at 359.

Although the Court's interpretation arguably rendered the second clause surplusage, it nonetheless refused to allow the Government to rely on one clause to avoid the restrictions of the other. *McNally*, 483 U.S. at 358 (rejecting the Government's claim that the first clause permitted conviction for non-property frauds that plainly fell outside the scope of the second). The Court explained that construing the statute to create a single limited offense better respected the traditional role of states in punishing fraud and was compelled by the "often stated" rule of lenity. *Id.* at 359-60.[11]

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[10] Specifically, lower courts inferred that because the second clause clearly punishes schemes "for obtaining money or property," the first clause's bare proscription of "any scheme or artifice to defraud" must reach beyond protecting property rights to protect "intangible rights." *McNally*, 483 U.S. at 358.

[11] Congress legislatively overruled the result in *McNally* by enacting 18 U.S.C. § 1346 to recognize claims of honest services fraud. But nothing in that enactment overturned this

Undeterred, in 2000 the Government attempted again to persuade this Court that the mail fraud statute "defines two independent offenses: (1) 'any scheme or artifice to defraud' and (2) 'any scheme or artifice . . . for obtaining money or property by means of false or fraudulent pretenses, representations, or promises.'" *Cleveland v. United States*, 531 U.S. 12, 25-26 (2000) (alteration in original) (quoting 18 U.S.C. § 1341). The Government argued in *Cleveland* – as it has here – that the second clause is broader than the first, such that the Government could prevail under the second clause even if it could not prove the elements of the first clause.[12] The Court, however, reaffirmed that the mail fraud statute defines a single offense, explaining again that the second clause "simply modifies the first." *Cleveland* 531 U.S. at 26. It further explained that the Government's interpretation was untenable because it would "approve a sweeping expansion of federal

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Court's holding that the two clauses are to be read jointly. *See Cleveland v. United States*, 531 U.S. 12, 25-26 (2000).

[12] The primary dispute in *Cleveland* was whether the mail fraud statute reached false statements in an application for a state poker license. 531 U.S. at 15. The Court concluded it did not violate the first clause because a "scheme to defraud" requires an attempt to obtain the property of the victim and, the Court held, a state license does not count as property while in the hands of the a state government. *Id.* Nevertheless the Government argued that the license was property in the hands of the recipient. *Id.* at 25-26. And because the second clause of Section 1341 criminalizes schemes to "obtain[] . . . property," the United States argued it should be interpreted more broadly than the first, extending to schemes not otherwise covered by the first clause. *Id.*

criminal jurisdiction in the absence of a clear statement by Congress" and run counter to the rule of lenity. *Cleveland* at 24.

c. The Tenth Circuit's rationale in this case cannot be squared with this Court's decisions in *McNally* and *Cleveland*.

The Tenth Circuit reasoned that because the two subsections of Section 1344 establish separate offenses, the Government can avoid the limitations of the first subsection (*i.e.*, the requirement that it prove intent to defraud a bank) by proceeding solely under the second. But that two-clause structure of Section 1344 is carried over from the mail and wire fraud statutes, and this Court has repeatedly held that those two clauses establish a single offense, the essence of which is captured in the original, first clause prohibiting schemes to "defraud." *See Neder*, 527 U.S. at 20-21; *Cleveland* 531 U.S. at 24-26. For that reason, this Court rejected the Government's attempts to avoid the limitations of the first clause by proceeding solely under the second, the very ploy the Tenth Circuit approved in this case.

To be sure, the bank fraud statute is different from the mail and wire fraud statutes in that it requires actions against a specific target (a bank) rather than through a specific means (the mails or wires). But that difference only reinforces the error of the Tenth Circuit's interpretation. Having eliminated the jurisdictional hook of the use of instrumentalities of interstate commerce, Congress was required to establish some other basis for federalizing what would otherwise be a crime subject to the historic exclusive jurisdiction of the states. The jurisdictional justification Congress landed upon

was the risk of injury to federally related financial institutions. Interpreting the bank fraud statute to cover intrastate fraud that threatens no loss to a financial institution would eliminate the connection between the statute and the constitutional power upon which it is premised.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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APPENDIX

APPENDIX A

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PUBLISH
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA, **Plaintiff-Appellee,** **v.** **KEVIN LOUGHRIN,** **Defendant-Appellant.**	**No. 11-4158**

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
(D.C. NO. 2:10-CR-00478-TC-SA-1)

Bretta Pirie, Assistant Federal Public Defender (Kathryn N. Nester, Federal Public Defender, and Scott Keith Wilson, Assistant Federal Public Defender, with her on the briefs) Office of the Federal Public Defendant, District of Utah, Salt Lake City, Utah, for Appellant.

Dave Backman, Assistant United States Attorney (David B. Barlow, United States Attorney, with him on the brief), Office of the United States Attorney, District of Utah, Salt Lake City, Utah, for Appellee.

Before KELLY, TYMKOVICH and GORSUCH, Circuit Judges.

TYMKOVICH, Circuit Judge.

Kevin Loughrin was convicted of bank fraud and other charges arising from a check and identity theft scheme. He now appeals his conviction on two grounds: (1) the district court's jury instructions on the bank fraud counts, 18 U.S.C. § 1344(2), were erroneous because they did not contain a requirement that Loughrin intended to defraud a bank; and (2) the delay between his indictment and trial violated his rights under the Speedy Trial Act.

We conclude the district court did not err in applying the requisite elements for bank fraud under § 1344(2) and that the subsection does not require proof that the defendant intended to defraud a bank. We also agree that Loughrin was tried within seventy days as required by the Speedy Trial Act.

Exercising our jurisdiction under 28 U.S.C. § 1291, we reject both of Loughrin's grounds for appeal and AFFIRM.

I. Background

Kevin Loughrin's charges arose from a scheme to steal checks from people's mail. After stealing the checks, he would alter them to make purchases at a local Target store. He would then return those purchases to Target for cash. The scheme came to an end when Loughrin and a codefendant, Theresa Thongsarn, were indicted on six counts of bank fraud, two counts of aggravated identity theft, and one count of possession of stolen mail.

Prior to trial, Loughrin filed a motion for dismissal based on violations of the Speedy Trial Act, which the district court denied. At trial Loughrin proposed that the jury instruction for bank fraud, 18 U.S.C. §

1344(2), specifically require the jury to find that he had an intent to defraud a financial institution in order to convict. The court, stating that the statute and Tenth Circuit law did not require such a finding, rejected Loughrin's proposed instructions. Loughrin was convicted on all six bank fraud counts, as well as on counts for stolen mail and aggravated identity theft. The court sentenced Loughrin to thirty-six months' imprisonment.

II. Analysis

Loughrin contends the district court erred in two ways: (1) the jury instructions on the bank fraud counts, 18 U.S.C. § 1344(2), failed to include a requirement that he intended to defraud a bank or financial institution; and (2) his rights under the Speedy Trial Act were violated due to unexcused delay between his indictment and trial. We disagree with both arguments.

A. Jury Instructions

Loughrin first argues the district court erred in refusing to instruct the jury that a conviction under § 1344(2) requires proof that he intended to defraud the banks on which the checks had been drawn. If the district court erred, Loughrin contends, there was insufficient evidence to sustain a conviction under § 1344(2). We review "a district court's refusal to give a requested instruction for abuse of discretion." *United States v. Crockett*, 435 F.3d 1305, 1314 (10th Cir. 2006). But we review the jury instructions de novo to determine "whether, as a whole, they accurately state the governing law." *Id.*

The Bank Fraud statute prohibits two types of conduct: "knowingly execut[ing], or attempt[ing] to execute, a scheme or artifice – (1) to defraud a financial institution; or (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of a financial institution, by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. § 1344. Though "largely overlapping, a scheme to defraud, and a scheme to obtain money by means of false or fraudulent pretenses, representations, or promises, are separate offenses." *United States v. Swanson*, 360 F.3d 1155, 1162 (10th Cir. 2004) (quoting *United States v. Cronic*, 900 F.2d 1511, 1513 (10th Cir. 1990)).

The two provisions have similar elements, differing only by the type of scheme each one targets. Our case law requires the government to prove: "(1) that the defendant knowingly executed or attempted to execute a scheme (i) to defraud [§ 1344(1)] *or* (ii) to obtain property by means of false or fraudulent pretenses, representations or promises [§ 1344(2)]; (2) that defendant did so with the intent to defraud; and (3) that the financial institution was then insured by the Federal Deposit Insurance Corporation." *United States v. Rackley*, 986 F.2d 1357, 1360-61 (10th Cir. 1993) (emphasis in original).

The differences in the prohibited conduct for each offense extend to the type of proof the government needs to offer. To establish that a bank was *defrauded* under § 1344(1), the government need not prove that the bank "suffered any monetary loss, only that the bank was put at potential risk by the scheme to defraud." *United States v. Young*, 952 F.2d 1252, 1257

(10th Cir. 1991). Yet a conviction under § 1344(2) requires no proof that a bank was "at risk" because there is no explicit requirement that a particular bank be defrauded. *United States v. Sapp*, 53 F.3d 1100, 1103 (10th Cir. 1995). As we explained in *Sapp*, the reason for this difference stems from the plain language of the statute: "[C]lause (1) focuses on the conduct as it affects the financial institution, while clause (2) emphasizes the conduct of the defendant." *Id.* Indeed, the latter "extends to any knowingly false representation" by the defendant. *Id.* at 1102 (quotation omitted).

Loughrin contends that a conviction under subsection § 1344(2), like one under § 1344(1), requires proof that he intended to defraud a bank. He argues that our decision in *Rackley* "suggests that the scheme to defraud and the false pretenses must equally be directed at a financial institution." Aplt. Br. at 18. But *Rackley*'s omission of "financial institution" from its listing of the elements of § 1344(1) does not change the fact that the text of § 1344(1) itself requires that the scheme be to "defraud a *financial institution*." 18 U.S.C. § 1344 (emphasis added). Under §1344(1), the scheme to defraud must necessarily be directed at a financial institution or bank – there is no way to defraud a bank without intentionally directing the fraud, in some way, at a bank. Yet under § 1344(2), there is no requirement in either *Rackley* or the text of § 1344(2) that the fraud must be intentionally directed at a bank. Unlike clause (1), clause (2) does not explicitly state who must be the object of the scheme. And *Rackley* indicates that only an intent to defraud *someone* is required. 986 F.2d at 1360-61. Thus, under our precedent, an individual can violate § 1344(2) by

obtaining money from a bank while intending to defraud someone else.

The district court's refusal to give Loughrin's proposed instruction to the jury is also correct in light of *Sapp*'s holding that § 1344(2) requires no proof that the bank was "at risk" of suffering financial loss. Loughrin's interpretation would effectively render *Sapp*'s holding superfluous: there is only a small subset of cases where a defendant would intend to defraud a bank and yet the bank would never be at any risk – *i.e.*, incompetent attempts. Proving risk of loss to a bank is sensible when the target of the fraud must be a bank; yet when no risk of loss is required, it would be incongruous to still require that the target be a bank. Accordingly, the district court did not err in refusing to instruct the jury that an intent to defraud the bank was required. And the government satisfied the fraudulent intent requirement of § 1344(2) with proof that Loughrin intended to defraud Target rather than a bank.

Loughrin counters that our interpretation of § 1344(2) creates bank fraud liability for any fraudulent scheme as long as a bank's assets are somehow involved, an outcome allegedly contrary to congressional intent and in conflict with the decisions of several circuits.[1] We recognize that our

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[1] *See United States v. Thomas*, 315 F.3d 190, 197 (3d Cir. 2002) (holding that "the *sine qua non* of bank fraud violation, no matter what subdivision of the statute it is pled under, is the intent to defraud the bank"); *United States v. Kenrick*, 221 F.3d 19, 29 (1st Cir. 2000) (holding "that the intent element of bank fraud under either subsection is an intent to deceive the bank in order to obtain from it money or other property"); *United States v. Blackmon*, 839 F.2d 900, 905-07 (2d Cir. 1988) (holding that

interpretation of § 1344(2) may cast a wide net for bank fraud liability, but it is dictated by the plain language of the statute and our prior precedent. We are bound by those cases "absent *en banc* reconsideration or a superseding contrary decision by the Supreme Court." *United States v. Meyers*, 200 F.3d 715, 720 (10th Cir. 2000).

In sum, we reject Loughrin's invitation to revisit the elements of bank fraud as set forth in our cases. The fact that Loughrin fraudulently obtained funds using bank checks, even though the bank was not at risk of loss, is sufficient to support his conviction for bank fraud.

B. Speedy Trial Act

Loughrin next argues that the district court violated his rights under the Speedy Trial Act (STA). We review a district court's denial of a motion to dismiss for violation of the Act for an abuse of discretion. *United States v. Larson*, 627 F.3d 1198, 1203 (10th Cir. 2010). The same standard applies when reviewing grants of an ends-of-justice continuance. *United States v. Toombs*, 574 F.3d 1262, 1268 (10th Cir. 2009). At the same time, we review the district court's compliance with the Act de novo and its findings of fact for clear error. *Id.*

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where victim was not a federally insured bank and there was no intent to defraud a bank, defendants' conduct of inducing victims to withdraw money from a bank could not constitute bank fraud under § 1344(a)(2) [different designation, but same statute]). *But see United States v. Everett*, 270 F.3d 986, 991 (6th Cir. 2001) (holding that "it is sufficient if the defendant in the course of committing fraud on *someone* causes a federally insured bank to transfer funds under its possession and control" (emphasis in original)).

Before discussing the legal framework applicable to Loughrin's Speedy Trial Act claims, we provide the necessary factual background.

1. Background

Loughrin and his codefendant, Thongsarn, made their first appearance in federal court on June 8, 2010. No motions were filed after the indictment, other than a *pro forma* discovery request, until July 29, when Loughrin requested a change-of-plea hearing, which was scheduled for August 16. The change-of-plea hearing on August 16 turned into a status conference, and the hearing was pushed back to August 20. On neither date, however, did Loughrin or Thongsarn plead guilty.

On August 27, the district court issued an order of continuance on the grounds that Thongsarn needed more time to understand the charges against her, tolling the time between August 16 and October 19, the then-scheduled trial date.

During this time, because of conflicts with his old counsel, Loughrin retained Emily Swenson as new counsel. Thongsarn also obtained new counsel. On October 15, the district court granted a continuance at the request of Thongsarn's new counsel, on the grounds that new counsel needed more time to familiarize himself with the case. At the time, Loughrin had not yet made a motion to sever his trial from Thongsarn's.

On November 3, Loughrin's new counsel moved to withdraw from representation due to a fee dispute. On November 16, the district court held a hearing to decide whether she could withdraw. The court continued the hearing to allow further discussions

between Loughrin and Swenson over whether her representation could continue and whether a plea deal could be worked out with the government. On November 18, the court orally granted Swenson's motion to withdraw and appointed the federal defender's office as counsel. On the same day, the court changed the trial date to January 24 and tolled the intervening time. The attorney present from the federal defender's office acquiesced to the continuance.

On December 28, Loughrin filed a motion to dismiss the aggravated identity theft charges, Counts 7 and 8. At a hearing on the motion (January 13, 2011), Loughrin's counsel stated Loughrin was ready to plead guilty to the bank fraud charges, Counts 1 through 6. The court replied it was unprepared to take Loughrin's plea that day. The court ultimately denied Loughrin's motion to dismiss Counts 7 and 8.

On January 14, the government filed a motion to continue the trial from January 24 to February 7 and to request that the sixteen days between Loughrin's motion to dismiss and the court's denial of the motion be excluded for Speedy Trial purposes. The government explained that it needed the continuance because it had been preparing for a separate trial while at the same time responding to Loughrin's motion to dismiss. The government also stated that it had been under the assumption that the motion to dismiss would result in a continuance. In its filing the government attached a proposed order, largely recapitulating the reasons set forth in its motion.

In a filing to the court on January 19, Loughrin's counsel, citing another trial he had scheduled for February 7, opposed the continuance. He also stated

that Loughrin no longer planned on pleading guilty to the bank fraud charges and would proceed to trial on all counts. The same day, the government filed a response and supplement to its earlier motion to continue, seeking an additional two-week continuance (for a total of four weeks) now that Loughrin no longer planned to plead guilty to the fraud counts for the purpose of locating six additional witnesses for trial. The government attached a new proposed order reflecting Loughrin's change-of-plea decision and the government's need to locate more witnesses.

On January 20, the district court issued an order of continuance, but adopted the proposed order submitted by the government on January 14, not the updated proposed order from January 19. Thus, the order filed by the court reflected the old facts: that Loughrin intended to plead to the fraud counts. The court also granted a two-month continuance, rather than the four-week continuance requested by the government, setting the trial date at March 21.

On January 25, the government filed a "Motion to Amend Order" informing the court that the court's January 20 order reflected facts that were no longer true. The government also requested an additional two-week continuance because the March 21 trial date would come three days after the likely end of a two-week trial with which the government's attorneys would be fully occupied. The government cited continuity-of-counsel reasons as the basis for its request for a continuance.

On February 2, the court held a hearing on the government's motion. The government explained that it would need additional witnesses now that Loughrin

was no longer going to plead guilty to any counts or stipulate to any facts. Loughrin's counsel responded that the government knew from the beginning that it had a nine-count trial, and, to the extent that Loughrin's intention to plea changed the government's planning, it was only for six days. Loughrin's counsel suggested that the government ask another prosecutor in its office to step in.

On February 7, the court issued an order of continuance moving the trial date from March 21 to April 4. The court amended its January 20 order to reflect the fact that the earlier continuance from January 24 to March 21 was justified on the grounds that the government needed additional time to prepare for trial given the defendant's decision to no longer plead guilty. The court explained that the further two-week continuance was justified on continuity of counsel grounds, given the conflicts imposed by the government's upcoming two-week trial.

On February 23, Loughrin filed a motion to dismiss the indictment due to violations of the Speedy Trial Act. In particular, Loughrin challenged the court's orders on January 20 and February 7, on the grounds that they were not in the interests of justice. On March 2, the court denied Loughrin's motion. One month later, the case proceeded to trial.

2. Speedy Trial Act Requirements

The Speedy Trial Act requires that a criminal trial begin no more than seventy days after the filing of an indictment or the defendant's first appearance in court. 18 U.S.C. § 3161(c)(1). The purpose of the Act is to "to protect a criminal defendant's constitutional right to a speedy trial and serve the public interest in

ringing prompt criminal proceedings." *United States v. Toombs*, 574 F.3d 1262, 1268 (10th Cir. 2009) (quoting *United States v. Thompson*, 524 F.3d 1126, 1131 (10th Cir. 2008)). But not every day counts towards the seventy-day limit because of a multitude of statutory exclusions, 18 U.S.C. § 3161(g), including, for example, (1) any "delay resulting from any pretrial motion," from the day of its filing to the day of disposition, *id.* § 3161(h)(1)(D), and (2) any "delay resulting from consideration by the court of a proposed plea agreement," *id.* § 3161(h)(1)(G).

If a delay does not fit within an explicit exclusion, the court may still exclude days from the seventy-day tally as long as it makes "findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." *Id.* § 3161(h)(7)(A). The court is required to make explicit findings in support of the exclusion, including, among others, whether any delay would result in a miscarriage of justice, the complexity of the case, and the need for adequate preparation. *Id.* § 3161(h)(7)(B). Importantly, if the court does not "set[] forth, in the record of the case, either orally or in writing, its reasons" for granting a continuance, then the delay resulting from that continuance will not be excluded from the seventy-day tally. *Id.* § 3161(h)(7)(A). At the same time, the court need not "articulate facts which are obvious and set forth in the motion for the continuance itself." *Toombs*, 574 F.3d at 1269 (quotation omitted). In determining whether the district court relied on sufficient facts in granting an ends-of-justice continuance, we can look to "the oral and written statements of both the district court and the moving party." *Id.* at 1271.

We have imposed a variety of requirements to police the district courts' use of ends-of-justice continuances. The district court must "consider[] the proper factors at the time such a continuance [is] granted." *United States v. Larson*, 627 F.3d 1198, 1204 (10th Cir. 2010) (quoting *Toombs*, 574 F.3d at 1269). The findings cannot consist of "short, conclusory statements lacking in detail." *Id.* (quoting *Toombs*, 574 F.3d at 1271). "While the preferred practice is for the district court to make its findings on the record at the time the continuance is granted, findings made contemporaneously with the granting of the continuance may be entered on the record after the fact if done before the court rules on a defendant's motion to dismiss." *Toombs*, 574 F.3d at 1269 (citing *Zedner v. United States*, 547 U.S. 489, 506-08 & n.7 (2006)).

With this legal framework in mind, we review the district court's calculation of excludable days under the Act.

3. Excludable Days

The parties agree forty-nine days are not excludable and count towards Loughrin's seventy-day tally. To determine whether there are more than twenty-one additional nonexcludable days, we must evaluate the effect of Loughrin's change-of-plea hearing and three ends-of-justice continuances granted by the district court. We consider each in turn.

a. Change-of-Plea Hearing

Loughrin first contends the district court erred in its calculation of the period from July 29, the day Loughrin's change-of-plea hearing was set, to August 15, the day before the hearing. While under §

3161(h)(1)(D) a pretrial motion tolls the clock – from the time it is filed until after the hearing – we have yet to determine whether a change-of-plea hearing qualifies as such a motion. Loughrin argues that it should not count as a pretrial motion because there is no briefing or argument associated with the proceeding. The government, by contrast, argues that a change of plea should count as a motion because it requires a hearing.

We have held that a motion under § 3161(h)(1)(D) need not cause "actual delay" in order to exclude the period after its filing, and before its disposition, from the seventy-day tally. *United States v. Williams*, 511 F.3d 1044, 1050 (10th Cir. 2007) (citation omitted). The focus of the subsection is whether the court's intervention is required or whether a hearing must be held. It is obvious that a change of plea triggers judicial action and even though it may not require formal briefing it will require a hearing addressing the merits with the defendant's participation.

At least two circuits have concluded that this judicial action qualifies a change-of-plea notice as a pretrial motion. *See United States v. Santiago-Becerril*, 130 F.3d 11, 20 (1st Cir. 1997); *United States v. Jenkins*, 92 F.3d 430, 440 (6th Cir. 1996). We agree with those cases. While a change-of-plea notice does not necessarily create extra work in the form of briefs to be filed or arguments to be made, it unsettles the parties' expectations and consumes time in the same way that a pretrial motion does.

> A change of plea hearing is essential to establish the knowing and voluntary nature of the defendant's guilty plea, and to determine

> the sufficiency of its factual basis. Until these factors are established, the court may not rule definitively on whether or not to accept the motion for change of plea.

Santiago-Becerril, 130 F.3d at 20. In sum, a "defendant's request to change his plea clearly constitutes a pretrial motion, a motion which automatically triggers an exclusion of time." *Id.* (citation omitted). A contrary conclusion, moreover, would create an incentive for defendants to file notices of disposition and later change their minds at the hearing – meanwhile, the seventy-day clock would continue to run.

We therefore conclude the days between a notice of a change of plea and the change-of-plea hearing are excludable under the STA. Accordingly, the eighteen days in dispute here do not count toward Loughrin's seventy-day tally.

b. November 18 Order of Continuance

The next question centers on the district court's November 18 order of continuance, which changed the trial date from December 13, 2010 to January 24, 2011 and prospectively tolled the period between the date of the order and the new trial date. Loughrin concedes that, due to other pretrial motions, only thirteen days in that period are in dispute.

The government raises a threshold argument that Loughrin waived the issue for appeal because he never specifically challenged the November 18

order in his motion to dismiss. The STA provides, "Failure of the defendant to move for dismissal prior to trial . . . shall constitute a waiver of the right to dismissal under this section." 18 U.S.C. § 3162(a)(2). The government contends this provision mandates waiver when a defendant raises an STA objection before trial but fails to challenge a particular order of continuance in that objection.

In support of this argument, the government points to an unpublished decision, *United States v. Seals*, 450 F. App'x 769 (10th Cir. 2011). We find its reasoning persuasive. There, the defendant filed a pretrial motion to dismiss the indictment based on a violation of the Speedy Trial Act. *Id.* at 770. On appeal, the defendant tried to raise an entirely different argument. The court noted, "We have interpreted this language [in 18 U.S.C. § 3162(a)(2)] to mean that we may not conduct any review of Speedy Trial Act arguments unraised below, not even for plain error." *Id.* at 771 (citing *United States v. Gomez*, 67 F.3d 1515, 1519-20 (10th Cir. 1995)). The court concluded that "not only must the defendant seek dismissal prior to trial, but he must do so *for the reasons* he seeks to press on appeal." *Id.* (emphasis in original) (citing *United States v. O'Connor*, 656 F.3d 630, 637-38 (7th Cir. 2011)). The court accepted the following reasoning:

> As the Seventh Circuit has aptly put it, "[i]f filing a motion to dismiss were enough to preserve all violations of the Act – whether identified in the motion or not – then the district court or the government, rather than

> the defendant, would effectively bear the burden of 'spotting violations,'" contrary to the statutory scheme.

Id. (quoting *O'Connor*, 656 F.3d at 638); *accord Zedner*, 547 U.S. at 502-03.

We agree. As the Supreme Court in *Zedner* noted, § 3162(a)(2) "assigns the role of spotting violations of the Act to defendants – for the obvious reason that they have the greatest incentive to perform this task." *Id.* By forcing defendants to raise all their arguments in the district court, we ensure that the arguments are adequately developed below and give the district court the opportunity to further explain its reasoning for granting a continuance. *Cf. Toombs*, 574 F.3d at 1269 ("[F]indings made contemporaneously with the granting of the continuance may be entered on the record *after the fact* if done before the court rules on a defendant's motion to dismiss." (emphasis added)). The alternative would force the court on a motion to dismiss for STA violation to consider every conceivable basis for challenging its orders of continuance and exclusions of time, for fear that the defendant would raise new arguments on appeal.

We therefore conclude that a defendant seeking to challenge on appeal a district court's order of continuance must do the same in his motion to dismiss to the district court. Because Loughrin did not object to the November 18 order, he cannot do so now. Accordingly, the thirteen days at issue here do not count toward Loughrin's seventy-day tally.

c. January 20 Order of Continuance

The next challenged period stems from the January 20 order of continuance. That order is

actually comprised of two orders: the original order on January 20, and the order as amended *nunc pro tunc* on February 7. We have stated that "although the ends-of-justice findings mandated by the Act 'may be *entered* on the record after the fact, they may not be *made* after the fact.'" *Williams*, 511 F.3d at 1055 (emphasis added) (quoting *United States v. Apperson*, 441 F.3d 1162, 1180 (10th Cir. 2006)). This means that continuances and the exclusion of days from the STA clock must be granted prospectively. Here, the January 20 Order moved the trial date from January 24 to March 21, while the February 7 Order, issued after a continuance hearing on February 2, amended the old one with new facts. *Williams* prohibits the new findings from being used to justify the old order for the period from January 24 to February 7. Those findings were not merely being *entered* on the record, but were being *made* in the first instance after a hearing. As such, they cannot be given retroactive effect. The January 20 order must survive on the record available at the time. *Cf. Toombs*, 574 F.3d at 1271 (noting that, when determining compliance with the Speedy Trial Act, the record includes "the oral and written statements of both the district court and the moving party").

Yet the only days that are in dispute – based exclusively on the court's January 20 order – are those between January 24, the previous trial date, and February 7, the day the order was amended. And of those days only one of them, January 24, is at stake for purposes of Loughrin's seventy-day tally. This is because Loughrin concedes that the rest of the period is tolled due to the government's motion to amend the district court's order. Because excluding or including

this one day will not be dispositive of Loughrin's STA claim, in the end we need not address the merits of the January 20 order.

d. February 7 Order of Continuance

Loughrin's final argument is that the court abused its discretion in entering the February 7 amended order of continuance. Upon recognizing that the district court's January 20 order was based on an erroneous fact – that Loughrin intended to plead guilty – the government made a motion on January 25 to amend the order. The district court held a hearing on the matter on February 2. At the hearing, the government explained that, while Loughrin no longer planned to plead guilty, his change of plea necessitated extra preparation by the government. The district court in its amended order on February 7 noted that, because Loughrin no longer intended to plead guilty to the bank fraud counts, the government would have to schedule and prepare fourteen to seventeen additional witnesses.

The district court concluded this additional preparation for the government justified the court's grant of a two-month continuance. Loughrin contends this additional work cannot justify the continuance because the government relied for only six days on Loughrin's representation that he would plead guilty – the time between Loughrin's January 13 statement in court that he would plead guilty to the bank fraud counts and his disavowal of that intention in his January 19 court filing. Yet as the government explains, Loughrin's change of plea was far more disrupting than it appears at first blush: Once Loughrin indicated that he wished to plead guilty, the

government had to call off most of its witnesses. Then when Loughrin changed his mind – only five days before the scheduled trial – the government had to resubpoena and reschedule those same witnesses. We agree that coordinating all those witnesses would require much more additional time than six days, the time that elapsed while Loughrin contemplated a plea of guilty.

Loughrin argues that, his change-of-plea notwithstanding, the government should have been prepared to go to trial because the evidence against him was duplicative of the evidence against Thongsarn, his codefendant, and that Thongsarn did not indicate she would plead guilty prior to the court's January order. This argument might have had some traction for the time period between January 24 and February 7, but as noted above, only one day is at stake and we need not consider it.

By February 7, the facts had changed. At the February 2 hearing, Thongsarn's counsel had indicated that his client would plead guilty before trial and would cooperate with the government. Before that, Thongsarn planned to go to trial and then give truthful incriminating testimony against Loughrin in order to obtain a more lenient sentence. At the hearing, Thongsarn's counsel indicated Thongsarn could provide additional evidence against Loughrin that could result in a superseding indictment. This proposed cooperation necessitated extra time so that the government could debrief Thongsarn and prepare her testimony for trial. We find these facts compelling.

Given the need for additional witness preparation, we cannot say that the district court abused its

discretion in amending its order to justify the two-month continuance. While perhaps the government did not need the full two months by the time of the February 2 hearing – indeed, it originally requested only one month – the facts do not indicate that the district court acted arbitrarily or capriciously in excluding those days from the STA clock.

Loughrin also argues that the district court legally erred in its February 7 order by not making adequate factual findings relating to the government's need for more time. In support of his argument, Louhgrin relies on *United States v. Gonzales*, 137 F.3d 1431 (10th Cir. 1998). In *Gonzales*, the prosecutor had asked for a later trial date because he was going to be out of town and needed sufficient time to prepare his witnesses. *Id.* at 1434. The court in *Gonzales* found that the district court erred in granting an ends-of-justice continuance without inquiring into the complexity of the case, into whether the case could be tried by someone else in the government's office, or into why the prosecutor had to be out of town in the first place. *Id.* at 1434-35.

Yet the record here is not nearly as sparse as that in *Gonzales*. The district court here inquired into the number of witnesses the government needed once Loughrin no longer intended to plead guilty and the effect Thongsarn's cooperation with the government would have on Loughrin's defense. This is far more substantial than the summary order the district court in *Gonzales* issued. The questioning the district court here engaged in was also far more probing. The court explicitly examined the basis of the government's need for more time. "Although a more thorough and explicit articulation might have better facilitated our review of

the district court's decision, the order did list the reasons supporting the finding." *United States v. Occhipinti*, 998 F.2d 791, 798 (10th Cir. 1993). We therefore conclude that the district court made no legal error. Accordingly, the thirty-three days that are in dispute between February 7 and March 21 do not count toward Loughrin's seventy-day tally.

As part of its February 7 order, the district court also granted an additional two-week continuance due to the government's conflict with another trial, moving the trial from March 21 to April 4. Only six days are at issue here (between March 21 and March 23, and between February 1 and February 3). Because these six days (and the one day we declined to address above), when added to the forty-nine undisputed days, do not push Loughrin's tally over seventy, we need not decide whether the two-week continuance was appropriate.

* * *

In sum, we conclude there was no violation of Loughrin's rights under the Speedy Trial Act.

III. Conclusion

Because the district court did not err in giving the jury instruction on 18 U.S.C. § 1344(2), and because the total number of nonexcludable days for purposes of the Speedy Trial Act was less than seventy, we AFFIRM the district court.

APPENDIX B

UNITED STATES DISTRICT COURT

[FILE STAMP]

Central District of Utah

JUDGMENT IN A CRIMINAL CASE

United States of America, v. Kevin Loughrin	Case Number: DUTX 2:10CR00478-001 TC USM Number: 17098-081

Benjamin McMurray
Defendant's Attorney

THE DEFENDANT:

___pleaded guilty to count(s)

__pleaded nolo contendere to count(s) which was accepted by the court.

√ was found guilty on count(s) 1, 2, 3, 4, 5, 6, 7, 8, 9 of the Indictment

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 USC § 1344	Bank Fraud		1-6
18 USC § 1028A	Aggravated Identify Theft		7 & 8
18 USC §§ 1708 and 2	Possession of Stolen Mail and Aiding and Abetting		9

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

___The defendant has been found not guilty on count(s)

___Count(s)_____ (is)_____(are) dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of any material changes in economic circumstances.

07/26/2011
Date of Imposition of Judgment

/s/ Tena Cambell
Signature of Judge

Tena Campbell United States District Court Judge
Name and Title of Judge

8-3-2011
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of

36 months custody total – 24 month term for count 7, 24 month term for count 8, which shall run concurrently with count 7 sentence, 12 month term for counts 1-6, 9, which will run consecutive to sentence imposed in count 7.

_√_ The court makes the following recommendations to the Bureau of Prisons:

The Court strongly recommends the defendant participate in RDAP or any other drug treatment, while incarcerated. The Court also recommends the defendant serve his sentence at a facility as close to Pennsylvania as possible, specifically Schuylkill, PA or Fort Dix, NJ.

_√_ The defendant is remanded to the custody of the United States Marshal.

____ The defendant shall surrender to the United States Marshal for this district.

__ at a.m./p.m. on _____.

__ as notified by the United States Marshal.

____ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

__ before 2 p.m. on _____.

__ as notified by the United States Marshal.

__ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on____ to _____at_____, with a certified copy of this judgment.

_____
United States Marshal

By: _____
Deputy United States Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:

60 Months

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

____The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable).

__√__ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

__√__ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

____ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

____ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law

enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant will submit to drug/alcohol testing under a copayment plan as directed by the probation office.

2. The defendant shall participate in a substance-abuse evaluation and/or treatment under a copayment plan as directed by the probation office. During the course of treatment, the defendant shall not consume alcohol nor frequent any establishment where alcohol is the primary item of order.

3. The defendant shall submit his person, residence, office, or vehicle to a search, conducted by the probation office at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release; failure to submit to a search may be grounds for revocation; the defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.

4. The defendant shall not have contact with his codefendant in this case.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Total Restitution
TOTALS	$900.00	$	$ 1,184.58

____The determination of restitution is deferred until_. *An Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

√___The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
Target AP Recovery 1000 Nicolle Mall TPS-2084 Minneapolis, MN 55403	1184.58	1184.58	
TOTALS	$ 1184.58	$ 1184.58	

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for the offenses committed on or after September 13, 1994, but before April 23, 1996

___Restitution amount ordered pursuant to plea agreement $_____.

____The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

√___The court determined that the defendant does not have the ability to pay interest and it is ordered that:

√___the interest requirement is waived for the ___fine__√_restitution.

____the interest requirement for the ___fine ___ restitution is modified as follows:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A. __√___Lump sum payment of $__900.00__ due immediately, balance due

___not later than___, or

___in accordance___C,___D,__E or__F below; or

B. _____Payment to begin immediately (may be combined with___C,___D, or___F below); or

C. _____Payment in equal__ (e.g., weekly, monthly, quarterly) installments of $_ over a period of__ (e.g., months or years), to commence _ days (e.g., 30 or 60 days) after the date of

this judgment; or

D. _____Payment in equal__ (e.g., weekly, monthly, quarterly) installments of $__ over a period of____, (e.g., months or years) to commence __ _ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E. _____Payment during the term of supervised release will commence within__ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time, or

F. √____Special instructions regarding the payment of criminal monetary penalties:

The Court orders restitution in the amount of $1,184.58, which is due immediately, and shall be payable at a minimum rate of $25 per month while incarcerated and a minimum of $100 per month upon release from incarceration, or as otherwise determined by the USPO. The Court waives the accrual of interest.

Unless the court has expressly ordered otherwise, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

√ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

Restitution of $1,184.58 is ordered joint and several with co-defendant, Theresa C. Thongsarn, 2:10CR00478-002 TC.

____The defendant shall pay the cost of prosecution.

____The defendant shall pay the following court cost(s):

____The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

APPENDIX C

[83] (968D)

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff,	Case No. 2:10-CR-478TC
vs.	SALT LAKE CITY, UTAH
KEVIN LOUGHRIN, Defendant.	April 5, 2011

JURY TRIAL

BEFORE THE HONORABLE TENA CAMPBELL
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

For the Plaintiff:

United States Attorney's Office
By: Adam Elggren, Esq.
Michael Thorpe, Esq.
185 South State Street, Suite 300
Salt Lake City, Utah 84111
(801) 524-5682

For the Defendant:

Utah Federal Defender Office
By: Benjamin C. McMurray, Esq.
Daphne A. Oberg, Esq.
46 West Broadway, Suite 110
Salt Lake City, Utah 84101
(801) 524-4010

Court Reporter:

Raymond P. Fenlon
300 South Main Street, #242
Salta Lake City, Utah 84101
(801) 809-4634

* * * *

[205:10]

THE COURT: Do you have a motion?

MR. McMURRAY: We would move pursuant to Rule 29 that the evidence presented against Mr. Loughrin is insufficient to support a conviction beyond a reasonable doubt.

THE COURT: All right. I'm going to deny it, but I'm going to tell you, parties and counsel, that my research has shown that in the Tenth Circuit, under 1344(1), which you seem to have tailored your jury instruction, or somebody, there has to be a risk of loss to the bank, but that that is not so for Subsection Two. Subsection Two is simply by false pretenses and representations to obtain money that is in the custody – care, custody and control of the bank or credit union.

I didn't hear anything that would fit Subsection One. I am wondering – although you didn't specify in the [206] indictment which it is, I am wondering if you believe on that, because I'm not hearing anything that would cause a loss, whether the only part of the bank fraud counts that could go to the jury would be Subsection Two.

MR. ELGGREN: And, Your Honor, the indictment is pled in the conjunctive. Both of those do appear, and if the mistake was –

THE COURT: That's not the issue. The issue is I'm not seeing any evidence that would cause – and the case law is pretty clear – that would cause a possible risk to the bank. That's Subsection One. And the leading case that's been followed in the Tenth Circuit, although it's an older case, it's clear up to date, is the *Sapp* case, 53 Fed.3d 1100. You have to have a risk of loss for Number One but not Number Two. And then in later cases the Tenth Circuit makes it very clear that they are quote distinct offenses.

What do you have that would support evidence-wise risk of loss to the bank, the financial institution? I've heard nothing.

MR. ELGGREN: Your Honor, well, I would disagree. I think that these checks, if they had gone through, and we've heard testimony that occasionally a fraudulent check makes it through and is honored by the bank, and that the bank can be – that the account holder is indemnified if they –

THE COURT: Who told us that?

[207]

MR. ELGGREN: That was Ms. Nelson I believe.

THE COURT: From?

MR. ELGGREN: Wells Fargo.

THE COURT: She said – I thought she said that they were not going – that they would not – that it was Target that was going to take the hit.

MR. ELGGREN: I think that was Ms. Gove. But Ms. Nelson did say that on occasion a fraudulent check is honored by her bank.

THE COURT: Sure, they go through.

MR. ELGGREN: And she said that the account holder has one year to notify the bank if they discover this.

THE COURT: And then if so, the question was asked would the bank take the loss? No, it would be Target.

MR. ELGGREN: It would go back to the store?

THE COURT: Uh-huh.

MR. ELGGREN: Okay, if that's what she said, and I may have not fully grasped that. The jury instructions that we provided do have both. And if we don't have loss to a bank, if that's not been shown in the evidence, we are okay with just going on the second prong of that.

THE COURT: Then that's what I'm going to do, and I'm going to tailor the jury instructions to only cover the second portion, which is to obtain property in the control, Subsection Two. And I would suggest that during the break you [208] look at the *Sapp* case that I gave you, and that there is a – there's some new cases, and I'll leave them up here and you can look at them.

Yes, Mr. McMurray.

MR. McMURRAY: I have resolved my own concern in my mind.

THE COURT: That's gratifying. Okay. So look at them, and it will also simplify. But there's simply nothing to show risk of loss or putting a bank, a financial institution, at risk.

MR. McMURRAY: So maybe just to make sure that I'm clear, even though the government in the indictment raised – or brought – filed under language that would implicate both subsections, as we move to closing arguments we're only going to be concerned with whether or not they have established the elements under Subsection Two?

THE COURT: That is correct. That is absolutely correct. And the jury instructions will be tailored during our instruction conference. And after we look at those cases, I think you'll see that.

MR. ELGGREN: Okay. Thank you, Your Honor.

THE COURT: All right. Do you have anything more to put on?

MR. McMURRAY: Can we take just a minute to confer, Your Honor?

[209]

THE COURT: Yes.

THE COURT: And I'm going to leave these cases up here.

MR. McMURRAY: Do you have a copy of the code by chance up there that I could borrow for just a minute?

THE COURT: The code? Sure. Well, it's in the cases, and you can see my book.

MR. McMURRAY: If I could just borrow your book for just a minute.

THE COURT: And I'm going to take about a 10 minute break, and then you all can get the names.

Ms. Cepernich, if you would come and sort of be the referee and make sure I get all my cases back. What I'm proposing to do is after the break come out, and then let's say at quarter of 1:00 let's do jury instructions so we don't have to do it tonight and you can get on to your class. We'll be in recess for about 10.

(RECESS FROM 12:05 P.M. UNTIL 12:20 P.M.)

THE COURT: Okay. So where are we now, counsel?

MR. McMURRAY: We do not intend to call any witnesses, Your Honor.

THE COURT: All right. United States, do you have any – did you see those cases?

MR. ELGGREN: We did, Your Honor.

THE COURT: All right. And do you agree with me, [210] not perhaps that the – and I've spoken with Ms. Cepernich, and she recalls the testimony of the Wells Fargo – or that witness who said if it was discovered within a year, then Target would take the hit, more than a year the customer takes the hit. So I heard no evidence of loss, possible loss, to the bank.

MR. McMURRAY: And that was my recollection of the testimony too, Your Honor.

THE COURT: Yeah, I thought so.

MR. ELGGREN: And that's my recollection too. I think I was just taken aback a little bit I think. But we're just fine proceeding on Subsection Two.

THE COURT: Okay. So I'm going to alter the jury instructions. So here is what I'm proposing. Everybody likes to get home at night, and you've got a

closing argument to make. Do you want to come back at quarter of 1:00 and do jury instruction conference?

MR. ELGGREN: That's fine with us, Your Honor.

THE COURT: And that will get it over with so you have this evening free.

MR. McMURRAY: That will be fine, Your Honor.

THE COURT: Okay. Shall I call them back in and just tell them that the case is over, the evidence has concluded and come back tomorrow for argument?

MR. McMURRAY: Yes. I think that's appropriate.

[211]

THE COURT: Does that work?

MR. ELGGREN: Yeah.

THE COURT: Let's do it. In fact would you all like lunch and start at 1:00 or do you want to start at quarter of 1:00?

MR. ELGGREN: 1:00 I think would be better, if that's okay, for us.

MR. McMURRAY: Yes, later, 1:00 o'clock would be good.

THE COURT: 1:00 o'clock so you can have the luxury of eating.

(JURY PRESENT)

THE COURT: Members of the jury, I've been informed that this closes the evidence part of the trial. What that means is what is left are I'm going to

instruct you on the law, and then the attorneys will argue, and sometime mid or late morning you will go out to reach your verdict. Do you want to come in and have things start at 8:30, 15 minutes earlier, or at 8:45? All in favor of 8:30 raise your hands. That's 15 minutes earlier. 8:45? 8:30, okay.

Are you all ready to start at 8:30?

MR. McMURRAY: Yes, Your Honor.

APPENDIX D

[1] (968E)

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. KEVIN LOUGHRIN, Defendant.	Case No. 2:10-CR-478TC SALT LAKE CITY, UTAH April 5, 2011

JURY INSTRUCTION CONFERENCE

BEFORE THE HONORABLE TENA CAMPBELL
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

For the Plaintiff:

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Court Reporter:

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(801) 809-4634

* * * *

[5:14]

McMURRAY: Your Honor, one addition that we would request, and this was also submitted in our proposed instructions, but on the third element where it says Mr. Loughrin acted with intent to defraud, we would like the Court to add specifically intent to defraud a financial institution. I think that this is consistent with the jurisdictional element of the case, the fact that it's specifically bank fraud as opposed to some other fraud.

And I think particularly in a case like this where, you know, there is clear evidence of general intent to defraud, I think that in order to make clear to the jury the jurisdictional aspect of the case, that has to be added [6] here.

THE COURT: All right. I'm going to deny that. I don't believe that's necessary, particularly since we took out Number 1, the first subsection, he acted with intent to defraud. The jurisdictional subhook comes in two places, that is the first element Mr. Loughrin has to execute or attempt – pay attention to the attempt. That's why I'm not proposing using your attempt – attempt to execute a scheme or artifice to obtain money or property from the particular bank or credit union and, fourth, that it would be capable of influencing the decision of a particular bank or credit

union. That is what gives us federal jurisdiction, and that goes in with the second part of Subsection of 1344 [sic] being separate from first, but your objection is noted.

MS. OBERG: Your Honor, I'm sorry, if I could just follow up with one thing.

THE COURT: Sure.

MS. OBERG: Just for clarification purposes, it's our understanding that he does have to intend to defraud a financial institution.

THE COURT: No.

MS. OBERG: It seems that otherwise it could be – he could intend to defraud his neighbor, and the result could be that the financial institution – you know, his neighbor goes and gets $40,000 from his bank account and because of [7] that he ends up being convicted of bank fraud. The concept of bank fraud would seem to include –

THE COURT: But, however, how would that render – and we're off.

(OFF THE RECORD)

Back on the record. We've got the case, the *Rackley* case, out of the Tenth Circuit. Ms. Cepernich has a copy for each of you, page five. The instruction is exactly as I gave it. Take a look at it. And that is what is found in the Pattern Jury Instructions for the Tenth Circuit for 2011 Number 2.58. The Defendant – Third Element, The Defendant Acted With Intent To Defraud.

MR. McMURRAY: Are we on the record?

THE COURT: Uh-huh.

MR. McMURRAY: And I remember reading this case, Your Honor, and recognize both what's in the case and also what's in the Tenth Circuit Pattern Instruction. One thing I would maybe point out with this regard is – two things.

Number one, I think on the facts of this case the Pattern Instruction may be inadequate or is inadequate in light of the facts. But more to the point, there's another component of the Tenth Circuit's pattern that's incorporated here in what you've provided, which is on the second page of your instruction number 18, which talks about what intent to defraud means. And this language does not come from *Rackley*. [8] It does come from the Tenth Circuit Pattern Instruction. And, again, I think this clarification could be misleading on the facts of this case.

It states that – specifically that the cause – it has to be intended to cause financial loss to another. And so I think that as this expansion of the definition is stated, that could be misleading. And so perhaps what we should do is rather than alter the – if the Court is disinclined to alter Element Three, perhaps we could state in this second to last paragraph financial loss to a financial institution.

THE COURT: Well, no, look.

MR. ELGGREN: We would object to that.

THE COURT: What I have now completely tracks for the one that we're needing, because we don't put the Fifth Element in from the pattern. But a scheme or artifice to defraud in the pattern, and I've got it here exactly, intended to deceive others in order to obtain something of value, such as money, from the

institution to be deceived. That's exactly what the law says and that's all I'm putting in. There is no intent to defraud the institution and so please do not argue that.

Okay. 18 is as it is.

MR. McMURRAY: Let me just make one – sorry, one clarification. You just said we can't argue intent to defraud the institution, but clearly we can still argue that there has [9] to be a scheme to obtain money or property from the bank.

THE COURT: Absolutely. Sure, you want to get the money from the bank. It just doesn't have to be – I mean you can – let me just put it this way. You can deceive the bank, but your purpose doesn't have to be to deceive the bank. It has to be – it can be perhaps to get it – maybe it's like this. Stick to the elements. But you deceive the bank because you want them to give you money, but you don't care if it puts them at any risk of loss or anything like that. You're not there to deceive the financial institution. You're just there to get money from them.

MR. McMURRAY: Thank you, Your Honor.

THE COURT: You're deceiving some others. Okay. 19, you've got problems, so let's go off the record.

* * * *

APPENDIX E

TITLE 18 – CRIMES AND CRIMINAL PROCEDURE

§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both.

* * * *

§ 1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

* * * *

§ 1344. Bank fraud

Whoever knowingly executes, or attempts to execute, a scheme or artifice—

(1) to defraud a financial institution; or

(2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;

shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

* * * *

§ 1346. Definition of "scheme or artifice to defraud"

For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

* * * *

APPENDIX F

FILED
United States Court of Appeals
Tenth Circuit
June 14, 2013
Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. KEVIN LOUGHRIN, Defendant-Appellant.	No. 11-4158

ORDER

Before **KELLY**, **TYMKOVICH**, and **GORSUCH**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

/s/

ELISABETH A. SHUMAKER, Clerk

OPPOSITION BRIEF

FILE COPY

Supreme Court, U.S.
FILED
NOV 18 2013
OFFICE OF THE CLERK

No. 13-316

In the Supreme Court of the United States

KEVIN LOUGHRIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether causing, or intending to cause, a risk of loss to a financial institution is an element of bank fraud.

2. Whether the district court correctly instructed the jury that it could convict petitioner of bank fraud under 18 U.S.C. 1344(2) if he "acted with intent to defraud" and knowingly executed a scheme to obtain money or property from a financial institution by means of false or fraudulent representations, but did not specify that the defendant must have intended to defraud the financial institution.

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In the Supreme Court of the United States

No. 13-316

KEVIN LOUGHRIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 710 F.3d 1111.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 2013. A petition for rehearing en banc was denied on June 14, 2013 (Pet. App. 50a-51a). The petition for a writ of certiorari was filed on September 9, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Utah, petitioner was convicted on six counts of bank fraud, in violation of 18 U.S.C. 1344; two counts of aggravated identity theft, in violation of 18 U.S.C. 1028A; and one count of pos-

session of stolen mail, in violation of 18 U.S.C. 1708. Pet. App. 23a. The district court sentenced petitioner to 36 months of imprisonment, to be followed by five years of supervised release. *Id.* at 25a-26a. The court of appeals affirmed. *Id.* at 1a-22a.

1. Between December 2009 and March 2010, petitioner was involved in a fraudulent scheme in which he used stolen and altered checks drawn on accounts in federally insured financial institutions to obtain cash and gift cards from merchants in Utah. Pet. App. 2a; Presentence Investigation Report (PSR) ¶¶ 6-27. In pursuit of his scheme, petitioner dressed as a Mormon missionary and (aided by accomplice Theresa Thongsarn, who served as a lookout) stole mail from more than 50 individuals. PSR ¶ 6; C.A. App. Vol. IV at 100-102. Petitioner then altered checks that he found in the stolen mail and prepared them for reuse by, *e.g.*, crossing out or erasing the existing writing or washing and bleaching a check before ironing it and drying it with a hair dryer. PSR ¶¶ 9-10; C.A. App. Vol. IV at 78-79, 105.

Accompanied by Thongsarn, petitioner then used (and attempted to use) the altered checks to purchase items at retail stores such as Target and Wal-Mart, after which he would return many items to the store to obtain cash or gift cards. C.A. App. Vol. IV at 119-120; PSR ¶¶ 9-10. Between December 31, 2009, and March 7, 2010, petitioner made purchases at multiple Target stores using six checks stolen from six different individuals and drawn from accounts at six different federally insured financial institutions, including Bank of America, Wells Fargo, and three credit unions. PSR ¶¶ 6-25; C.A. App. Vol. I at 24. After being arrested and advised of his rights following one of the

incidents, petitioner admitted that he had stolen checks from the mail, altered them, and negotiated the checks at multiple stores. PSR ¶ 9.

2. Based on the foregoing conduct, a grand jury charged petitioner with six counts of bank fraud, in violation of 18 U.S.C. 1344; two counts of aggravated identity theft during and in relation to the bank fraud, in violation of 18 U.S.C. 1028A; and one count of possession of stolen mail, in violation of 18 U.S.C. 1708. C.A. App. Vol. I at 23-26. Petitioner pleaded not guilty and proceeded to trial.

a. At the close of the government's case, petitioner orally moved for judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29. Pet. App. 35a. In the course of denying the motion, the district court noted that the counts of the indictment that charged petitioner with violating 18 U.S.C. 1344 appeared to rely on both subsections of that provision—Section 1344(1), which prohibits executing a scheme or artifice to "defraud a financial institution" and Section 1344(2), which prohibits executing a scheme or artifice "to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. 1344; see Pet. App. 35a. The district court explained that the Tenth Circuit had held that a conviction under Section 1344(1) requires proof that the fraudulent scheme "cause[d] a possible risk [of loss] to the bank," while a conviction under Section 1344(2) (which the Tenth Circuit has held is a "distinct offense[]") does not. *Id.* at 35a-36a (citing *United States* v. *Sapp*, 53 F.3d 1100 (10th Cir. 1995), cert. denied, 516 U.S. 1082 (1996)). The court con-

cluded that the government had not presented evidence of risk of loss and that, as a result, the case could proceed only under Section 1344(2). *Id.* at 36a-37a. The prosecutor agreed that, if risk of loss to the bank had "not been shown in the evidence," the government would submit the case to the jury—and the jury would thus only be instructed on—"the second prong" of Section 1344. *Id.* at 37a.[1]

b. Petitioner requested two changes from the Tenth Circuit's Criminal Pattern Jury Instruction for bank fraud (Instruction 2.58). First, petitioner requested that the district court instruct the jury that it must find that petitioner acted with an "intent to defraud a financial institution," rather than just "an intent to defraud," in order to convict under Section 1344. Doc. No. 109-1, Def. Proposed Instruction No. 1, at 1 (Apr. 1, 2011); Pet. App. 43a. The district court denied the request, explaining that the request deviated from the Tenth Circuit's pattern instruction and the Tenth Circuit's decision in *United States* v. *Rackley*, 986 F.2d 1357, 1360-1361, cert. denied, 510 U.S. 860 (1993). Pet. App. 44a-45a. Second, at the charging conference petitioner requested in the alternative that the court alter the language in the pattern instruction explaining the phrase "intent to defraud" to state that the defendant's deception must be for the purpose of causing "financial loss to a financial institution" rather than "financial loss to another." *Id.*

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[1] Petitioner asserts that the district court "granted the [Rule 29] motion in part." Pet. 4. Although the effect at trial of the court's ruling was analogous to the partial grant of a Rule 29 motion, the court stated that it was "going to deny" the motion, Pet. App. 35a, and the Minute Entry on the docket similarly reflects that the court "denie[d]" petitioner's motion, C.A. App. Vol. I at 125.

at 45a. The court denied that request as well. *Id.* at 45a-46a. The district court ultimately used the pattern instruction's explanation of "intent to defraud," which provides that "[a] defendant acts with the requisite 'intent to defraud' if the defendant acted knowingly and with the specific intent or purpose to deceive, ordinarily for the purpose of causing some financial loss to another or bringing about some financial gain to the defendant." C.A. App. Vol. I at 149.

The jury convicted petitioner on all counts and the district court sentenced him to 36 months of imprisonment, to be followed by a five-year term of supervised release. Pet. App. 25a-26a. According to the Bureau of Prisons website, petitioner was released from custody in January 2013.

3. The court of appeals affirmed. Pet. App. 1a-22a. Petitioner "argue[d] the district court erred in refusing to instruct the jury that a conviction under § 1344(2) requires proof that he intended to defraud the banks on which the checks had been drawn." *Id.* at 3a; see Pet. C.A. Br. 12 (arguing that the district court "erred in defining the intent required to commit bank fraud as an intent to defraud anyone, rather than as the intent to defraud a financial institution"); Pet. C.A. Reply Br. 1-13 (arguing that instruction was erroneous because it omitted a requirement "that a defendant intend to defraud a bank").

The court of appeals rejected that contention. The court explained that, under circuit precedent, the government was required to present proof that a defendant intended to defraud a bank only if it sought a conviction under Section 1344(1), which expressly reaches schemes "to defraud a financial institution." Pet. App. 4a-5a (quoting 18 U.S.C. 1344(1)). By con-

trast, the court continued, "there is no requirement in * * * the text of § 1344(2) that the fraud must be intentionally directed at a bank. Unlike clause (1), clause (2) does not explicitly state who must be the object of the scheme." *Id.* at 5a. Relying on circuit precedent, the court stated that "only an intent to defraud *someone* is required" because "an individual can violate § 1344(2) by obtaining money from a bank while intending to defraud someone else." *Id.* at 5a-6a.

The court of appeals acknowledged that its "interpretation of § 1344(2) may cast a wide net for bank fraud liability" and that its construction of the bank fraud statute differed from that of other courts of appeals. Pet. App. 6a-7a & n.1. The court explained, however, that its interpretation was "dictated by the plain language of the statute and [its] prior precedent." *Id.* at 7a.[2]

4. Petitioner filed a petition for rehearing en banc, which the court of appeals denied when no active judge called for a vote on the petition. Pet. App. 50a.

ARGUMENT

Petitioner argues (Pet. 8-32) that the Court should grant his petition for a writ of certiorari to resolve a conflict among the courts of appeals concerning the scope of the bank fraud statute. Petitioner is correct (Pet. 9) that the courts of appeals disagree about two aspects of the proof needed to establish the intent element of bank fraud under 18 U.S.C. 1344:

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[2] The court of appeals rejected petitioner's additional argument that the delay between his indictment and trial violated his rights under the Speedy Trial Act. Pet. App. 7a-22a. Petitioner does not renew that claim in his petition for a writ of certiorari.

(1) whether the government must prove that the defendant caused or intended to cause a risk of loss to a financial institution, and (2) whether the government must prove that the defendant intended to defraud a financial institution directly rather than obtaining funds in a financial institution by defrauding a third party. The division among the courts of appeals principally concerns the first question about risk of loss. But petitioner did not press that question in the court of appeals, and the court of appeals did not address it. Rather, the court of appeals addressed only the second question. Although some division among the courts of appeals exists on that separate question, the question arises very infrequently and is not of sufficient general importance to warrant the Court's review at this time, especially in isolation from the risk-of-loss issue that petitioner waived. The petition should therefore be denied.

1. The bank fraud statute makes it a crime when a person:

> knowingly executes, or attempts to execute, a scheme or artifice—
>
> (1) to defraud a financial institution; or
>
> (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises.

18 U.S.C. 1344. The statute thus prohibits "any 'scheme or artifice to defraud a financial institution' or to obtain any property of a financial institution 'by false or fraudulent pretenses, representations, or promises.'" *Neder* v. *United States*, 527 U.S. 1, 20-21

(1999). Congress intended the statute, like the mail and wire fraud statutes, to have a broad scope, see S. Rep. No. 225, 98th Cong., 1st Sess. 378-379 (1983), and courts have construed it to encompass a variety of fraudulent schemes that undermine the integrity of the banking system. See *United States* v. *Brandon*, 17 F.3d 409, 426 (1st Cir.), cert. denied, 513 U.S. 820 (1994); *United States* v. *Rackley*, 986 F.2d 1357, 1361 (10th Cir.), cert. denied, 510 U.S. 860 (1993).

a. As petitioner notes (Pet. 8-16), some disagreement among the courts of appeals exists concerning the intent necessary to constitute bank fraud in certain circumstances. The crux of this disagreement concerns whether, in order to establish that the defendant possessed the requisite intent to defraud, the government must prove in every case that the defendant exposed, or intended to expose, a bank to the risk of financial loss. The Sixth, Ninth, and Eleventh Circuits have rejected such a requirement. *United States* v. *Everett*, 270 F.3d 986, 991 (6th Cir. 2001), cert. denied, 537 U.S. 828 (2002); *United States* v. *McNeil*, 320 F.3d 1034, 1037-1039 (9th Cir.), cert. denied, 540 U.S. 842 (2003); *United States* v. *De La Mata*, 266 F.3d 1275, 1298 (11th Cir. 2001), cert. denied, 535 U.S. 989 (2002). In contrast, the Second, Fourth, Fifth, and Seventh Circuits have held that the government must prove, as an element of the offense, that the defendant intended to expose the bank to a risk of loss or civil liability. *United States* v. *Rodriguez*, 140 F.3d 163, 168 (2d Cir. 1998); *United States* v. *Brandon*, 298 F.3d 307, 312 (4th Cir. 2002); *United States* v. *Odiodio*, 244 F.3d 398, 401 (5th Cir. 2001); *United States* v. *Davis*, 989 F.2d 244, 246-247 (7th Cir. 1993). The First Circuit has held both that the government need not prove

an intent to harm, *United States* v. *Kenrick*, 221 F.3d 19, 29 (en banc), cert. denied, 531 U.S. 961 and 531 U.S. 1042 (2000), and that a defendant must "know[] that his fraudulent actions will expose some bank * * * to a risk of loss," *United States* v. *Ayewoh*, 627 F.3d 914, 921 (2010). The Eighth Circuit requires a loss, or attempt to cause a loss, to a financial institution, but only to secure a conviction under Section 1344(2). *United States* v. *Staples*, 435 F.3d 860, 867, cert. denied, 549 U.S. 862 (2006). The Third Circuit similarly requires that the fraudulent scheme expose the bank to some kind of loss and that the defendant intended to harm the bank, but only in situations in which the bank is not the target of the fraud. *United States* v. *Leahy*, 445 F.3d 634, 646-647, cert. denied, 549 U.S. 1071 (2006). The Tenth Circuit takes the opposite approach, requiring "that the bank [be] put at potential risk by the scheme to defraud" only with respect to Section 1344(1). Pet. App. 4a (quoting *United States* v. *Young*, 952 F.2d 1252, 1257 (10th Cir. 1991)).

b. Although petitioner cites cases involving the risk-of-loss conflict (Pet. 8-17) and suggests that "[t]his case presents the ideal vehicle for resolving" the various conflicts about Section 1344, Pet. 22, this case is not an appropriate vehicle for such intervention for two reasons. First, the risk-of-loss issue was neither presented to nor addressed by the court of appeals. Second, it is not apparent that the outcome of petitioner's case would have been different (had he pressed the issue on appeal) in those circuits that require proof of a risk of loss.

i. Petitioner conflates (Pet. 9-17) the two separate issues on which courts of appeals disagree—whether

the government must prove a risk of loss or intent to cause such a risk; and whether the government must prove an intent to defraud a financial institution directly—suggesting that both questions are implicated by his petition. That is not so. The court of appeals did not address the risk-of-loss question on which the courts of appeals are most deeply divided because petitioner did not argue on appeal that the jury instructions erroneously omitted a risk-of-loss requirement.

When petitioner moved for judgment of acquittal at the close of the government's case, the district court stated that circuit precedent required proof of a risk of loss to the bank under Section 1344(1) and concluded that the government had not presented such proof. Pet. App. 35a-38a. The court therefore determined that the jury would be instructed only on the elements of bank fraud under Section 1344(2), which the Tenth Circuit had held does not require proof of a risk of loss. *Id.* at 37a-38a. Petitioner did not object to the district court's failure to include a risk-of-loss instruction. Nor did he request that the court include the portion of the pattern instruction that would require proof (under Section 1344(1)) that "the defendant placed [a particular financial institution] at risk of civil liability or financial loss." Doc. No. 109-1, Def. Proposed Instruction No. 1, at 1.[3]

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[3] Petitioner requested that, if the district court chose not to instruct the jury that it must find that petitioner acted with an "intent to defraud a financial institution," the court should define the phrase "intent to defraud" as acting with a purpose to cause "financial loss *to a financial institution*" rather than "to another." Doc. No. 109-1, Def. Proposed Instruction No. 1, at 1; Pet. App. 45a (emphasis added). The district court denied the request. Pet.

On appeal, petitioner conceded that the risk-of-loss issue on which courts of appeals are divided is "not relevant to [his] case." Pet. C.A. Br. 23 n.4; see Pet. C.A. Reply Br. 8 (noting that the risk-of-loss question is "not one at issue" in this case). Instead, petitioner focused only on whether the district court erred in failing to instruct the jury that it must find proof that petitioner had an intent to defraud a financial institution specifically rather than merely an intent to defraud someone. Pet. C.A. Br. 12. That was how the court of appeals understood his argument. Pet. App. 3a (first error asserted was that "the jury instructions on the bank fraud counts, 18 U.S.C. § 1344(2), failed to include a requirement that [petitioner] intended to defraud a bank or financial institution"); *ibid.* ("[Petitioner] first argues the district court erred in refusing to instruct the jury that a conviction under § 1344(2) requires proof that he intended to defraud the banks on which the checks had been drawn."); *id.* at 5a ("[Petitioner] contends that a conviction under subsection § 1344(2), like one under § 1344(1), requires proof that he intended to defraud a bank."). And that was the sole aspect of the jury instructions that the court of appeals addressed. *Id.* at 5a-7a. Accordingly, because petitioner affirmatively waived reliance on a

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App. 45a-46a. Although the requested definition of "intent to defraud" references financial loss, the district court understood the request as another way of requiring proof of intent to defraud a bank directly, see pp. 20-22, *infra*, rather than as a request for an instruction on risk-of-loss. Pet. App. 43a-46a. On appeal, petitioner's discussion of the "intent to defraud" definition in the instructions confirms that his request sought to require proof that his deceit was directed at the bank directly, not proof that he exposed the bank (or intended to expose the bank) to a risk of loss. Pet. C.A. Br. 12-30.

risk-of-loss requirement, and the court of appeals did not address it, this case is not a suitable vehicle for deciding whether the district court erred in omitting such a requirement from the jury instructions under Section 1344(2).[4]

ii. Second, this case would also be an unsuitable vehicle for addressing the risk-of-loss requirement because it is highly unlikely that the ultimate outcome in this case—which involves negotiation of fraudulent altered checks—would be affected by such a requirement.

Because petitioner's failure to request a risk-of-loss instruction "precludes appellate review, except as permitted under Federal Rule of Criminal Procedure 52(b)," Fed. R. Crim. P. 30(d), any instructional-error claim on that point would be limited to plain error. A case in which the defendant must establish the additional plain-error showings, see *United States* v. *Olano*, 507 U.S. 725, 732-737 (1993), is not an appropriate vehicle for reviewing a claim of instructional

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[4] In his petition for rehearing en banc, petitioner noted that some courts of appeals have required proof of a risk of loss by a financial institution. C.A. Pet. for Reh'g 1, 10-14. Petitioner argued that adoption of such a requirement "achieves very similar results to the requirement that a defendant intend to defraud a bank," *id.* at 10, and seemed to embrace it, *id.* at 11. But "[i]t has been the traditional practice of this Court * * * to decline to review claims raised for the first time on rehearing in the court below." *Wills* v. *Texas*, 511 U.S. 1097, 1097 (1994) (O'Connor, J., concurring in denial of certiorari); see *Herrera* v. *Lemaster*, 301 F.3d 1192, 1196 (10th Cir. 2002) ("We will not consider new assertions presented for the first time on rehearing en banc."), cert. denied, 537 U.S. 1197 (2003). And petitioner offers no reason why this Court should depart from that practice in this case, particularly when he affirmatively waived the issue in his briefs to the panel.

error. And a sufficiency-of-the-evidence claim fares no better because the negotiation of a forged check, even to a third party, should be sufficient to establish bank fraud even in the risk-of-loss circuits.

First, all the courts of appeals that have addressed the issue—including those that employ a risk-of-loss requirement—agree that a defendant commits bank fraud when he knowingly and intentionally negotiates fraudulent checks at a bank. See, *e.g.*, *United States* v. *Laljie*, 184 F.3d 180, 189 (2d Cir. 1999) ("Presentation to a financial institution of a fraudulent document that exposes the institution itself to a potential loss if * * * funds be released, such as a forged or altered document, is within the scope of § 1344."); *United States* v. *Monostra*, 125 F.3d 183, 188 (3d Cir. 1997); *United States* v. *Barakett*, 994 F.2d 1107, 1111 (5th Cir. 1993), cert. denied, 510 U.S. 1049 (1994); *United States* v. *Lamarre*, 248 F.3d 642, 649 (7th Cir.), cert. denied, 533 U.S. 963 (2001); *United States* v. *Hill*, 197 F.3d 436, 444-445 (10th Cir. 1999); see also *United States* v. *Hoglund*, 178 F.3d 410, 412-413 (6th Cir. 1999) (affirming bank fraud conviction based on negotiation of forged check). Thus, had petitioner presented the altered stolen checks directly to a bank for payment, his conduct would fall squarely within the statute's proscription under the approach taken by every court of appeals.

The difference between this case and those cases is that petitioner presented the altered stolen checks to a third-party merchant that would be responsible for obtaining payment on the check from the issuing bank rather than directly to the bank itself. But the courts of appeals that require the government to prove that a defendant intended to expose a bank to a risk of finan-

cial loss have held that a showing of actual loss is not required. See, *e.g.*, *United States* v. *McCauley*, 253 F.3d 815, 820 (5th Cir. 2001); *United States* v. *Stavroulakis*, 952 F.2d 686, 694 (2d Cir.), cert. denied, 504 U.S. 926 (1992). And such courts have also made clear that the bank need not be the primary victim of the defendant's fraud. See, *e.g.*, *United States* v. *Crisci*, 273 F.3d 235, 240 (2d Cir. 2001) (explaining that a defendant "is not relieved of criminal liability for bank fraud because his primary victim was the employer from which he embezzled funds by submitting fraudulent check requests"); *Barakett*, 994 F.2d at 1111 ("[W]e have not held that [Section 1344(1)] punishes only schemes directed *solely* at institutional victims."). As the Fourth Circuit explained in *Brandon*, a defendant's knowing negotiation of a fraudulent bank check "satisfies the requirement 'that a bank [be] an actual or intended victim of [the] defendant's scheme,' even if the [fraudulent] instrument is presented to a third party and not directly to a bank." 298 F.3d at 312 (quoting *Crisci*, 273 F.3d at 240) (first alteration in original); cf. *Brandon*, 17 F.3d at 426 (1st Cir.) (refusing to allow defendants "to sanitize their fraud by interposing an intermediary or an additional victim between their fraud and the federally insured bank").[5]

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[5] Those courts have also made clear that the risk of loss faced by the bank may be slight. See *McCauley*, 253 F.3d at 820 (noting that government need not prove "substantial likelihood of risk of loss to support the convictions"; bank suffered potential risk of loss because it "lost its ability to earn interest" on funds transferred as a result of defendants' scheme); *United States* v. *Jacobs*, 117 F.3d 82, 93 (2d Cir. 1997) (observing that, "under the case law, a mere possibility of detrimental reliance [by the bank on defendant's fraudulent conduct] is enough"); *Barakett*, 994 F.2d at 1111 n.15 ("Even proof of an extremely remote risk will suffice.").

As a result, fraudulent schemes designed to obtain funds in the custody of a bank by the negotiation of an altered or forged check inherently pose a risk to the bank sufficient to satisfy the risk-of-loss circuits.

Second, petitioner is incorrect in asserting (Pet. 17) that his case would have come out differently if he had been prosecuted in the Fifth or Eighth Circuits. He relies on the Fifth Circuit's decision in *Odiodio*, *supra*, in which the defendants deposited a stolen check in a non-FDIC insured brokerage account and then transferred the money to Texas banks. 244 F.3d at 400. The court of appeals held that the government failed to prove risk of loss to the banks, as opposed to the brokerage firm, because "Texas law assigns the full risk of loss to the bank that dealt with the forger or his work." *Id.* at 402. *Odiodio* did not alter the Fifth Circuit's rule that the risk of loss needed to satisfy the intent element may be slight and extremely remote. See *United States* v. *Morganfield*, 501 F.3d 453, 466 & n.51 (2007), cert. denied, 553 U.S. 1067 (2008); *McCauley*, 253 F.3d at 820. And subsequent Fifth Circuit decisions strongly suggest that, under facts analogous to those of this case, the government adduced sufficient evidence of risk of loss by presenting testimony that a bank, through mistake or otherwise, honored a fraudulent check in the first instance. Compare C.A. App. Vol. IV at 75 (trial testimony that account holder discovered petitioner's fraud when she checked her "bank account on line and * * * noticed an abnormal amount of a check [written on] her checking account"), with *United States* v. *Goodale*, No. 11-51204, 2013 WL 2631322, at *5 (5th Cir. June 12, 2013) (finding that government satisfied risk-of-loss element through testimony that, even though

account on which check was written had been closed, there remained a possibility of loss "through human or computer error" in processing it), and *Jacobs*, 117 F.3d at 93 (noting that, "for purposes of construing the statute, we must assume a highly incautious bank").

Petitioner also errs in relying on the Eighth Circuit's decision in *Staples*, *supra*. The court in *Staples* recognized that the outcome there was "unusual" because it was driven in part by the "law of the case" that had developed in the course of that prosecution, including the government's erroneous request for jury instructions requiring it to establish (1) the elements of both prongs of Section 1344 and also (2) "that the defendant's scheme was designed to obtain monies that were owned by *and* under the custody of the financial institution." 435 F.3d at 866-868. Because the court of appeals found the evidence insufficient on the latter ground, *id.* at 868, its earlier conclusion with respect to risk of loss—based in part on a government concession—was not necessary to the decision, *id.* at 867.

Third, on facts quite similar to the facts of this case, courts of appeals that do require proof of risk of loss have affirmed bank fraud convictions. For example, in *Brandon*, 298 F.3d at 309-314 (4th Cir.), the indictment alleged that the defendant "stole checks from legitimate accounts, forged the account holder's signature on the checks, and then presented the forged instruments to merchants who exchanged goods for the funds held by the drawee banks." *Id.* at 312. The Fourth Circuit held that those allegations satisfied the statute's intent-to-defraud element because "an inevitable part of this process is the eventu-

al presentation of the stolen and forged checks to the drawee banks, which exposes the banks to a potential risk of loss." *Ibid.*; see *id.* at 313; see also *Crisci*, 273 F.3d at 240 (2d Cir.) (evidence sufficient to prove intent to defraud a bank where the defendant "cashed seventeen fraudulent checks with forged endorsements, even though defendant physically presented the forged checks to [a check-cashing company] and not a bank"); *Goodale*, 2013 WL 2631322, at *1, *5-*6 (5th Cir.) (affirming bank fraud conviction where defendant stole a check book from former account holder's car and "used the stolen items to negotiate fraudulently seven checks" for $460 in merchandise at a gas station, and holding that the defendant's "negotiating forged checks to [the gas station], in and of itself, established his intent to defraud [the bank], sufficient to uphold his § 1344 bank-fraud conviction").

Fourth, the district court's ruling at the close of the evidence that the government had failed to present sufficient evidence of risk of loss to merit a jury instruction on liability under Section 1344(1), Pet. App. 36a-37a, does not change the reality that negotiation of an altered or forged instrument always poses such a risk. The court's ruling appeared to be based on the mistaken premise that the government could prove risk of loss only by introducing specific evidence beyond the fact that petitioner negotiated forged or altered checks—*i.e.*, testimony that the transactional rules governing the relationship between Target and the six financial institutions allocated the risk to the banks rather than to the merchant or the individual account holders. See *ibid.* As explained, that premise is incorrect because "the presentation of a forged or

altered instrument is evidence, in and of itself, of an intent to defraud a bank." *Brandon*, 298 F.3d at 313 (4th Cir.); see *Goodale*, 2013 WL 2631322, at *6. Section 1344 criminalizes schemes to deceive financial institutions; it does not require that such schemes actually result in the fraudulent acquisition of such institutions' property. Petitioner's "scheme exposed the drawee banks to potential loss in that" petitioner altered checks "from existing bank accounts * * * and then injected the forged instruments into the stream of commerce." *Brandon*, 298 F.3d at 313 (4th Cir.). As the Fourth Circuit has explained, "[a]n inherent part of [such a] scheme was that the forged checks would eventually be presented to the drawee banks, exposing the banks to a risk of loss." *Ibid.* That was petitioner's scheme and it is irrelevant to a risk-of-loss analysis whether Target's practices might have prevented the checks from ultimately being presented to the banks.

Thus, even if the intent element includes a risk-of-loss requirement, the undisputed evidence that petitioner presented stolen and altered checks to Target precludes a showing that any forfeited instructional error affected petitioner's substantial rights and would be sufficient to submit the case to the jury. Accordingly, this case would not be a suitable vehicle for addressing the circuit conflict on that requirement even if petitioner had not waived the issue by failing to present it to the court of appeals.

c. In any case, petitioner's argument that Section 1344(2) requires proof of risk of loss lacks merit. The text of the statute makes no mention of foreseeable or contemplated risk of loss. 18 U.S.C. 1344; see *United States* v. *Nkansah*, 699 F.3d 743, 754-755 (2d Cir.

2012) (Lynch, J., concurring). To the contrary, "[a]ll the statute facially seems to require in a case involving property in the custody or control of a bank, is that there be an attempt to obtain such property from the bank by deceptive means." *McNeil*, 320 F.3d at 1037. Congress could reasonably conclude, as the text of the bank fraud statute indicates, that ensuring the integrity of federally insured and controlled financial institutions requires criminalizing all attempts to use deception to obtain assets within the institutions' custody or control, whether or not the government proves, in a particular case, that the attempt has exposed, or was intended to expose, the institution to a potential loss. See *Id.* at 1038-1039.[6]

2. Unlike the risk-of-loss issue, the court of appeals did squarely address (Pet. App. 5a-7a) petitioner's contention that a bank fraud conviction under Section 1344(2) requires proof that the defendant intended to defraud a financial institution directly. Although the courts of appeals disagree on that ques-

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[6] Nor is there merit to petitioner's suggestion (Pet. 25) that applying the bank fraud statute to the present case without a risk-of-loss requirement improperly "federalizes broad swaths of traditional state crimes." As discussed at pp. 13-14, *supra*, this case does not implicate that concern because negotiating forged checks does threaten the bank with a risk of loss, even when the checks are first presented to a third party. Even if the conduct at issue may be prosecuted in state court, moreover, that possibility neither precludes federal prosecution nor eliminates the federal interest. See *United States* v. *Morgenstern*, 933 F.2d 1108, 1113 (2d Cir. 1991) ("While [defendant's] conduct could have been handled in state court as a simple case of business fraud, this does not preclude treating it as an instance of federal bank fraud if the relevant statutory elements are satisfied."), cert. denied, 502 U.S. 1101 (1992).

tion as well, further review is not warranted at this time because the answer to that question rarely makes a difference in any case, and the Court should not address it in a case in which the defendant waived his opportunity to raise the more important risk-of-loss question.

a. Petitioner correctly identifies (and the court of appeals acknowledged, see Pet. App. 6a-7a & n.1), a conflict among the courts of appeals on the question whether Section 1344 requires proof that the defendant intended to deceive the bank itself, rather than a third party. Although a majority of the circuits has held that bank fraud under either prong of Section 1344 requires an intent to deceive the bank directly, see, *e.g.*, *Jacobs*, 117 F.3d at 92-93 (2d Cir.); *United States* v. *Thomas*, 315 F.3d 190, 197-198 (3d Cir. 2002), the court below joined the Sixth Circuit in holding that the intent element in prosecutions under Section 1344(2) can be satisfied if the defendant intends to defraud a third party and obtains money from a bank as part of the scheme, see Pet. App. 5a-6a; *Everett*, 270 F.3d at 991.[7]

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[7] Petitioner errs in suggesting (Pet. 15-16) that the Ninth Circuit agrees with the minority view that the government need not prove an intent to defraud a financial institution directly (rather than a third party), quoting that court's statement that "[a]ll the statute facially seems to require in a case involving property in the custody or control of a bank[] is that there be an attempt to obtain such property from the bank by deceptive means." *McNeil*, 320 F.3d at 1037. Here again petitioner conflates the risk-of-loss issue addressed above with the question whether a defendant may commit bank fraud under Section 1344(2) without an intent to defraud a bank directly. The Ninth Circuit in *McNeil* did not conflate those issues, expressly declining to decide "whether § 1344(2) reaches cases in which no deception actually is aimed at the bank" because

The division among the courts of appeals on this issue does not, however, present a question of general importance warranting the Court's review. As noted at pp. 13-14, *supra*, the courts of appeals widely agree that a defendant can commit bank fraud even when the bank is not the immediate or even the primary victim of the defendant's fraudulent scheme. See, *e.g.*, *Crisci*, 273 F.3d at 240 (2d Cir.); *Leahy*, 445 F.3d at 662 (3d Cir.); *Brandon*, 298 F.3d at 312 (4th Cir.); *McNeil*, 320 F.3d at 1037 (9th Cir.); *United States* v. *Singer*, 152 Fed. Appx. 869, 876 (11th Cir. 2005). As the Second Circuit's decision in *Crisci* demonstrates, even those courts that construe the statute to require proof that the defendant intended to victimize a financial institution regularly find that element satisfied when a third party (*e.g.*, the defendant's employer) is the primary victim and fraudulent documents are presented to a bank. The distinction between the majority position and the view adopted by the court below on this issue—*i.e.*, the difference between an instruction requiring the jury to find simply an "intent to defraud" and one requiring "an intent to defraud a financial institution"—will rarely be of practical importance.

The lack of practical importance is borne out by the infrequency with which the Sixth Circuit's intent phrasing has been dispositive. Indeed, in *Everett* itself, the defendant was an accountant who engaged in deception toward a bank by forging (or having a co-schemer) forge the signature of a client on checks and

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the defendant there *had* "engaged in a course of deception toward the bank." *Ibid.* The other Ninth Circuit case on which petitioner relies, *United States* v. *Rizk*, 660 F.3d 1125 (2011), did not concern Section 1344(2) at all.

then presenting the checks to a bank for payment. 270 F.3d at 988. Before the decision below, the Sixth Circuit's decision in *Everett* was the only court of appeals decision to expressly hold that the government may prove bank fraud under Section 1344(2) by proving that "the defendant in the course of committing fraud on *someone* causes a federally insured bank to transfer funds under its possession and control." *Id.* at 991. In prior briefs in opposition to certiorari involving bank fraud, the government has taken the position that Section 1344(2) is "properly applied whenever a defendant deceives the bank in order to obtain funds under the bank's custody and control." U.S. Br. in Opp., *Wilson* v. *United States*, No. 03-304, 2003 WL 22471180, at *13 (Oct. 27, 2003). And since *Everett*, no Sixth Circuit prosecution appears to have been based on any different understanding. The government's historic focus on fraudulent schemes that feature acts of deception aimed at a bank thus indicates that bank fraud prosecutions that do not involve deception toward a bank should be exceedingly rare. The majority rule would bar prosecutions based on any different theory in most other circuits. And this case would be an exception only if one assumes that the negotiation of a forged or altered check to a merchant is not intended to defraud the bank on which the check is drawn, a dubious assumption. If review were warranted of the rare scenario in which a person intends to deceive or defraud only a third party, it should await an appropriate case presenting that issue as well as the deeper circuit conflict involving the risk-

of-loss question that petitioner expressly declined to press in the court of appeals.[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2013

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[8] Petitioner's argument (Pet. 26-32) that the Tenth Circuit's view that Section 1344 creates two separate offenses conflicts with this Court's decisions construing the separate mail fraud statute in *McNally* v. *United States*, 483 U.S. 350 (1987), and *Cleveland* v. *United States*, 531 U.S. 12 (2000), also fails to provide a reason for review of the bank fraud statute in this case. Petitioner failed to press any such claim in the court of appeals, but instead relied on the distinct elements of the two subsections. *E.g.*, Pet. C.A. Br. 17. Petitioner identifies no conflict on that issue in the courts of appeals and there does not appear to be a well-developed divide. Besides the court below, see *United States* v. *Swanson*, 360 F.3d 1155, 1162 (10th Cir. 2004) (relying on *United States* v. *Bonnett*, 877 F.2d 1450, 1453-1454 (10th Cir. 1989)), several other courts of appeals have also held that Subsections (1) and (2) describe two different manners of committing bank fraud, see, e.g., *Kenrick*, 221 F.3d at 27-29 (1st Cir.); *Crisci*, 273 F.3d at 239-240 (2d Cir.); *Staples*, 435 F.3d at 867 (8th Cir.); *McNeil*, 320 F.3d at 1037 (9th Cir.). The Third Circuit has held, however, "that the intent to defraud the bank element of § 1344(1) must apply to § 1344(2) as well." *Leahy*, 445 F.3d at 642-643.

REPLY BRIEF

RECORD AND BRIEFS

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IN THE

Supreme Court of the United States

KEVIN LOUGHRIN,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

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REPLY BRIEF FOR THE PETITIONER

The Government acknowledges that the courts are divided on whether the Government must prove intent to defraud a financial institution under 18 U.S.C. § 1344(2). BIO 20. It does not dispute that this case is an adequate vehicle for resolving that division. And the Solicitor General even suggests that the court of appeals erred in accepting the Government's argument that no such proof was required. *See id.* 22. Instead, the United States claims that the error should be allowed to persist indefinitely – relieving the Government of the burden of proving an essential element of the crime in at least two circuits in which the United States frequently brings bank fraud prosecutions – because the question lacks "practical importance." *Id.* 21. That claim is meritless and the need for review is only heightened by the Government's refusal to defend in this Court the rule it successfully advanced below.

The United States also agrees that the circuits are divided over whether "in order to establish that the defendant possessed the requisite intent to defraud, the government must prove in every case that the defendant exposed, or intended to expose, a bank to the risk of financial loss." BIO 8. The Government does not dispute that *this* question has practical importance, but claims that the issue was not adequately preserved below and that it "is not apparent" that its resolution would make a difference to the outcome in this case. *Id.* 9. But those assertions are also wrong. Petitioner pressed, and the Tenth Circuit indisputably passed upon, the question. And its resolution would be outcome

determinative in this case – the district court found, and the Government never disputed below, that the prosecution presented no evidence that petitioner's conduct was intended to, or did, pose a risk of loss to a bank. Pet. App. 35a-37a.

I. Whether Intent To Defraud A Bank Is An Element Of Criminal Bank Fraud Is A Question Of Substantial Practical Importance.

The Government's only significant basis for opposing certiorari on the intent-to-defraud issue is its claim that the question "rarely makes a difference in any case." BIO 20. But the Solicitor General fails to support that assertion, which in any event is no reason to allow the Government to avoid in some circuits its burden to prove that element when it *does* make a difference to the outcome.

The question is particularly important in a wide range of cases, like this one, in which the defendant targets a third party that is not a bank. *See, e.g.*, *United States v. Nkansah*, 699 F.3d 743, 746-47 (2d Cir. 2012) (defendant targeted IRS); *United States v. Repella*, 359 Fed. Appx. 294, 295 (3d Cir. 2009) (unpublished) (online merchants); *United States v. Staples*, 435 F.3d 860, 862-64 (8th Cir. 2006) (title company); *United States v. Singer*, 152 Fed. Appx. 869, 872 (11th Cir. 2005) (unpublished) (merchants); *United States v. Reaume*, 338 F.3d 577, 579-80 (6th Cir. 2003) (merchants), *cert. denied*, 540 U.S. 1166 (2004); *United States v. McNeil*, 320 F.3d 1034, 1036 (9th Cir. 2003) (IRS), *cert. denied*, 540 U.S. 842 (2003); *United States v. Thomas*, 315 F.3d 190, 193-94 (3d Cir. 2002) (employer); *United States v. Brandon*, 298 F.3d 307, 309-10 (4th Cir. 2002)

(merchant); *United States v. Crisci*, 273 F.3d 235, 237-38 (2d Cir. 2001) (employer); *United States v. Everett*, 270 F.3d 986, 988 (6th Cir. 2001) (former employer), *cert. denied*, 537 U.S. 828 (2002); *United States v. Odiodio*, 244 F.3d 398, 400 (5th Cir. 2001) (brokerage firm); *United States v. Sprick*, 233 F.3d 845, 848-50 (5th Cir. 2000) (client); *United States v. Rodriguez*, 140 F.3d 163, 165 (2d Cir. 1998) (employer); *United States v. Davis*, 989 F.2d 244, 246 (7th Cir. 1993) (IRS); *United States v. Orr*, 932 F.2d 330, 331-32 (4th Cir. 1991) (merchants); *United States v. Blackmon*, 839 F.2d 900, 902-03 (2d Cir. 1988) (con artist victim).

The Government argues that intent to defraud a bank is easily proven in such cases, BIO 21, but it ignores the decisions in which courts have found the Government's proof insufficient. *See, e.g.*, *Staples*, 435 F.3d at 868; *Thomas*, 315 F.3d at 202; *Rodriguez*, 140 F.3d at 168; *Orr*, 932 F.2d at 332; *see also Repella*, 359 Fed. Appx. at 296-97 (evidence insufficient to support guilty plea).[1] And those

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[1] While the Government insinuates that it could have proven petitioner's intent to defraud a bank in this case, *see* BIO 22, it does not claim that it actually did so; to the contrary, it has only ever argued that no such proof was required. *See* Pet. 5-6. Moreover, presentation of an altered check to a third party is not itself sufficient to prove intent to defraud a bank. *See, e.g.*, *Nkansah*, 699 F.3d at 750. And even if the Government could claim that there was sufficient evidence to prove intent to defraud a bank, the question was never put to the jury in this case and the Government has never asserted (and thus has waived) any claim that the instructional error was harmless. *See* U.S. C.A. Br. § II. Indeed, the trial court took pains to tell the jury that petitioner's assertion that "he was hoping to take

citations do not reflect the unknown number of similar cases in which the Government could not appeal a trial court's unpublished insufficiency determination or the cases the Government has declined to prosecute in circuits applying the majority rule because it understood that the intent-to-defraud requirement would preclude a conviction.

The Government says that even if intent to defraud a bank is required, leaving the circuit conflict unresolved should not result in *too* many wrongful convictions because the Tenth Circuit's position is in the minority and the Solicitor General included a sentence in a brief in opposition a decade ago that could be read to agree with the majority view. BIO 22. But the Solicitor General fails to acknowledge that the Tenth Circuit adopted the minority position in this case *at the Government's* urging.[2] And, in any event, the fact that the Tenth Circuit's position is so extreme that it has been rejected by the majority of other circuits *and* the Solicitor General is reason to extinguish it, not a reason to allow it to persist.

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money from Target" and that he "wanted to defraud Target, not a bank" "doesn't matter" because petitioner "did not have to intend to defraud the bank." R. at 317.

[2] *See* U.S. C.A. Br. § II (heading: "The Court Properly Instructed the Jury That, to Find Loughrin Guilty of Bank Fraud under 18 U.S.C. § 1344(2), the Jury must Find That Loughrin Acted with 'Intent to Defraud,' Not That He Acted with 'Intent to Defraud a Financial Institution.").

II. The Risk-Of-Loss Question Is Properly Before The Court And Outcome Determinative.

The Government does not dispute the practical importance of the risk-of-loss question, but argues that the issue was not preserved below and that it is "not apparent" that resolving the question would make a difference to the outcome of this case. BIO 9. Neither claim is correct.

A. The Risk-Of-Loss Issue Was Pressed And Passed Upon Below.

1. As an initial matter, the Government's preservation argument depends on the assertion that the two questions are sufficiently distinct as to require separate preservation. But the court of appeals saw the issues as inextricably intertwined. It explained that the circuit had previously held that "[t]o establish that a bank was defrauded," the Government must prove that "the bank was put at potential risk." Pet. App. 4a (emphasis and citation omitted). Accordingly, if the court accepted petitioner's argument that intent to defraud a bank was required for a Section 1344(2) prosecution, circuit precedent would dictate that risk-of-loss must be proven as well. But the Tenth Circuit had previously held that "a conviction under § 1344(2) requires no proof that a bank was 'at risk.'" Pet. App. 5a (citing *United States v. Sapp*, 53 F.3d 1100, 1103 (10th Cir. 1995)). The court thus understood petitioner's intent-to-defraud argument to constitute a challenge to the circuit's prior rejection of a risk-of-loss requirement under subsection (2). *See* Pet. App. 7a. The court "reject[ed] Loughrin's invitation to revisit the elements of bank fraud as set forth in our

cases," *id.*, and instead held that the "district court's refusal to give Loughrin's proposed instruction to the jury" was "correct in light of *Sapp*'s holding that § 1344(2) requires no proof that the bank was 'at risk' of suffering financial loss," *id.* 6a.

2. In any event, to the extent he needed to, petitioner adequately preserved his risk-of-loss argument as a distinct claim below.

a. As the Government acknowledges, petitioner requested a jury instruction requiring proof that the scheme was intended to cause some "financial loss to a financial institution." Pet. App. 45a. The Government says that was just "another way of requiring proof of intent to defraud a bank directly." BIO 10-11 n.3. But the Government does not deny that, whatever the intent behind it, the instruction adequately conveys the risk-of-loss requirement. And it cites no authority for its suggestion that an instruction that is adequate on its face to preserve an issue for appeal is somehow rendered inadequate by someone's subjective understanding of it.

Even if the instructional error were not preserved, that would be no bar to review of petitioner's separate claim that there was insufficient evidence to prove risk of loss, which petitioner squarely raised in his Rule 29 briefing. *See* R. at 176, § III (heading: "The evidence does not establish that Mr. Loughrin's conduct placed the financial institution at risk of civil liability or financial loss."); *id.* at 176-77 ("The better rule is that convictions under subsection (2) require proof of risk of loss just as convictions under subsection (1)."") (footnotes omitted); *Boyle v. United Tech. Corp.*, 487 U.S. 500, 513-14 (1988) (failure to preserve jury instruction

objection does not prevent appellate review of sufficiency-of-the-evidence claim); *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 82 (1967) (same).

b. The Government further does not dispute that petitioner raised the risk-of-loss issue with the first appellate body empowered to accept it – the Tenth Circuit sitting en banc. *See* BIO 12 n.4. However, it claims that this was too late, citing a *Wills v. Texas*, 511 U.S. 1097, 1097 (1994) (O'Connor, J., concurring in denial of certiorari). But Justice O'Connor's point in that case, arising from a state court, was simply that a federal issue cannot be interjected into a state case for the first time in a petition for rehearing because the state court's refusal to consider an untimely new argument is an adequate and independent state ground for the decision and deprives this Court of jurisdiction over the appeal. *See id.* (citing, *e.g.*, *Radio Station WOW v. Johnson*, 326 U.S. 120, 128 (1945) (collecting cases)). No such jurisdictional impediment arises in this federal case, and petitioner's decision to raise the question to the en banc court rather than the panel was entirely appropriate.[3]

Indeed, the Government has itself urged this Court to grant review of issues raised for the first time in a petition for rehearing en banc, arguing that the "government's acquiescence in the [challenged]

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[3] *Herrera v. Lemaster*, 301 F.3d 1192, 1196 (10th Cir. 2002), does not hold to the contrary. *Contra* BIO 12 n.4. There, a party attempted to raise for the first time en banc a factual issue the panel was fully empowered to consider.

rule until the rehearing stage does not provide a basis for denying review as a matter of discretion" because the rule "represented established Ninth Circuit precedent" and the "government could not have prevailed on its initial appeal by challenging it before the panel." U.S. Pet. Reply 2, *United States v. Ramirez*, No. 96-1469.[4] Because the same is true here, there is "therefore no merit to respondent's contention that the petition should be denied because of an alleged waiver." *Id.* 2-3.

3. Ultimately, none of the above matters because the court of appeals passed on the risk-of-loss issue, which is sufficient to bring the question to this Court.

This Court's traditional rule "precludes a grant of certiorari only when the question presented was not pressed *or* passed upon below." *United States v. Williams*, 504 U.S. 36, 41 (1992) (emphasis added, internal quotation marks omitted). The "rule operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon." *Id.*; *see also, e.g., Virgina Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991).

Here, the court of appeals unquestionably passed on the question whether risk-of-loss is required under the statute. As described above, the court recognized and reaffirmed its decision in *Sapp* that risk-of-loss was not required, and relied on that holding to reject petitioner's intent-to-defraud argument. Pet. App. 4a-7a. The court thus ultimately held that the "fact

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[4] *Available* at http://www.justice.gov/osg/briefs/1996/w961469w.txt.

that Loughrin fraudulently obtained funds using bank checks, *even though the bank was not at risk of loss*, is sufficient to support his conviction for bank fraud." *Id.* 7a (emphasis added).

This Court has found issues preserved in similar circumstances. For example, in *Lebron v. Nat'l RR Passenger Corp.*, 513 U.S. 374, 378-79 (1995), the plaintiff "expressly disavowed" on appeal that Amtrak was a government entity, but argued that it was nonetheless a state actor for other reasons. In addressing that assertion, the court of appeals "noted that Amtrak was . . . not a Government entity." *Id.* at 378. That statement, this Court subsequently held, passed upon the question of Amtrak's government status sufficiently to preserve the question for this Court's review. *Id.* at 379; *see also, e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 330 (2010) (lower court passed on continuing validity of Supreme Court precedent by relying on those decisions to reject plaintiff's argument).

B. The Government's Claim That It Might Have Been Able To Prove Risk-Of-Loss In This Case Is No Basis To Deny Review.

The Government's claim that it "is not apparent" that the risk-of-loss question would make a difference to the outcome of this case, BIO 9, is no ground for denying certiorari and is baseless in any event. The district court found that the Government failed to produce any evidence that petitioner's conduct posed any risk of loss to a bank. Pet. App. 36a-37a. The Government acquiesced to that finding in the trial court, *id.*, 37a, and never argued on appeal that it was wrong, Pet. 22. The court of appeals thus

affirmed petitioner's conviction on the understanding that "the bank was not at risk of loss." Pet. App. 7a.

The Solicitor General now suggests, for the first time in the case, that the evidence did show risk of loss to the bank, under a proposed per se rule that "negotiation of an altered or forged check" is always sufficient, as a matter of law, to satisfy the Government's burden. BIO 15. But that argument is waived in this case, and in any event has been rejected in decisions from the Second, Third, Fifth, and Eighth Circuits. *See* Pet. 13-14 (discussing *Odiodio*, 244 F.3d at 402 (insufficient evidence of risk of loss despite defendant's use of altered checks); *Staples*, 435 F.3d at 867 (same)); *Thomas*, 315 F.3d at 201-02 (rejecting the Government's "assump[ption] that the mere act of presenting fraudulently drawn checks to a bank for payment constitutes a loss to it or a potential for liability"); *Nkansah*, 699 F.3d at 746, 749-51 (evidence insufficient in forged endorsements case); *Repella*, 359 Fed. Appx. at 295-97 (same for falsified check information for online purchases); *cf. J. Walter Thompson, U.S.A., Inc. v. First BankAmericano*, 518 F.3d 128, 131 n.2 (2d Cir. 2008) ("The loss associated with an altered check typically rests with the party who took it from the wrongdoer.") (emphasis omitted).

The Solicitor General's attempts to address some of these precedents are unconvincing. He argues that "subsequent Fifth Circuit decisions strongly suggest that" the Fifth Circuit has changed course since *Odiodio*. BIO 15. But his only authority for that proposition is an unpublished decision which did not adopt the Government's per se rule, but turned instead on the fact that in *that* case, the

Government's bank witness testified that because the altered checks had been written on a closed account, the bank would be obligated to absorb any loss if the checks were honored. *See United States v. Goodale*, No. 11-51204, 2013 WL 2631322, at *5 (5th Cir. June 12, 2013) (unpublished). Of course, that circumstance did not arise in this case and the Government's bank witness here gave the opposite testimony. Pet. 3; Pet. App. 36a-37a; *cf. Davis*, 989 F.2d at 247 (reversing conviction where Government perhaps could have, but did not, prove risk of loss); *Sprick*, 233 F.3d at 853 (same).

The Government's attempt to distinguish *Staples*, BIO 16, is likewise unconvincing. Rather than apply the Government's propose per se rule, the Eighth Circuit found the evidence "insufficient, because there was no loss, or attempt to cause a loss, to a financial institution," *id.*, even though the checks were altered, *id.* at 862-63. While the Government might have avoided the need to prove risk-of-loss if it had pleaded the case differently, BIO 16, that does not undermine the court's holding on what proof of risk-of-loss requires. And the fact that the Eighth Circuit found the evidence insufficient in other respects as well, *id.*, means only that there were alternative holdings, not that the risk-of-loss holding was dicta. *See Sutton v. Addressograph-Multigraph Corp.*, 627 F.2d 115, 117 n. 2 (8th Cir. 1980) ("When two independent reasons support a decision, neither can be considered obiter dictum.") (citation omitted).

Accordingly, at best, the Government can argue that there is a further circuit conflict over what is required to prove risk-of-loss in a case involving altered checks. But that is no reason for this Court

to leave unresolved the antecedent and "more important risk-of-loss question." BIO 20.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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JOINT APPENDIX

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IN THE

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KEVIN LOUGHRIN,

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v.

UNITED STATES OF AMERICA

Respondent.

On a Writ of Certiorari to
the United States Court of Appeals
for the Tenth Circuit

JOINT APPENDIX

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APPENDIX A

EXCERPTS OF JURY INSTRUCTIONS

* * * * *

INSTRUCTION NO. 14

The Grand Jury Charges:

COUNTS 1-6

(18 U.S.C. §1344 and §2: Bank Fraud, Aiding and Abetting)

On or about the dates listed below, in the Central Division of the District of Utah,

KEVIN LOUGHRIN

defendant herein, did knowingly execute and attempt to execute a scheme and artifice to defraud financial institutions and obtain money, funds, assets and other property in the custody and control of financial institutions by means of false and fraudulent pretenses; and did attempt to do so; to wit: he did negotiate the stolen and fraudulent checks listed below at Target Stores locations in Salt Lake County, Utah, which checks were written on the accounts at the financial institutions listed below, in the amounts listed below:

CT.	DATE	CHK. NO.	FIN. INST.	ACCT. NO.	AMOUNT
1	12/31/2009	2334	Wells Fargo Bank	xxx-7290	$232.84
2	12/31/2009	738	MACU	xxx-8024	$151.36
3	1/10/2010	3915	AFCU	xxx-1738	$245.73
4	2/8/2010	507	Zions Bank	xxx-6862	$199.73
5	2/8/2010	705	U. of U. CU	xxx-1831	$162.55
6	3/7/2010	1219	Bank of America	xxx-4069	$192.32

America first Credit Union (AFCU), Bank of America, Mountain America Credit Union (MACU), University of Utah Credit Union (U. of U. CU), Wells Fargo and Zions Bank being financial institutions within the meaning of 18 U.S.C. §20 and whose deposits, at all times material to this Indictment, were insured by either the Federal Deposit Insurance Corporation or the National Credit Union Association; and did aid and abet therein; all in violation of 18 U.S.C §1344 and 18 U.S.C. §2.

COUNT 7

(18 U.S.C. §1028A and §2: Aggravated Identity Theft, Aiding and Abetting)

On or about January 10, 2010, in the Central Division of the District of Utah.

KEVIN LOUGHRIN

defendant herein, did, without lawful authority, knowingly possess and use means of identification of other persons, to wit: the names, address and America First Credit Union account number of G. R. B. and J. M. B., individuals whose full names are known to the Grand Jury, during and in relation to a felony violation enumerated in 18 U.S.C. §1028A(c), to wit: Bank Fraud in violation of 18 U.S.C. §1344 as alleged in Count 3, which Count is incorporated herein by reference; and did aid and abet therein; all in violation of 18 U.S.C. §1028A(a)(l) and 18 U.S.C. §2.

COUNT 8

(18 U.S.C. §1028A and §2: Aggravated Identity Theft, Aiding and Abetting)

On or about February 8, 2010, in the Central Division of the District of Utah,

KEVIN LOUGHRIN

defendant herein, did, without lawful authority, knowingly possess and use means of identification of other persons, to wit: the names, address and Zions Bank account number of L. F. R. and K. C. R., individuals whose full names are known to the Grand Jury, during and in relation to a felony violation enumerated in 18 U.S.C. §1028A(c), to wit: Bank Fraud in violation of 18 U.S.C. §1344 as alleged in Count 4, which Count is incorporated herein by reference; and did aid and abet therein; all in violation of 18 U.S.C. § l028A(a)(l) and 18 U.S.C. §2.

COUNT 9
(18 U.S.C. §1708 and §2: Possession of Stolen Mail, Aiding and Abetting)

On or about January 10, 2010in the Central Division of the District of Utah,

KEVIN LOUGHRIN

defendant herein, did unlawfully have in his possession an article which had been stolen from a letter box, mail receptacle, and other authorized depository for mail matter, to wit: check number 3915, written on the America First Credit Union account of G. R. B. and J. M. B. and deposited in the mail by G. R. B. on or about January 9, 2010, knowing the same to have been stolen; and did aid and abet therein; all in violation of 18 U.S.C. §1708 and 18 U.S.C. §2.

A TRUE BILL:

_____

FOREPERSON OF THE GRAND JURY

CARLIE CHRISTENSEN
Acting United States Attorney

_____

ADAM S. ELGGREN
Assistant United States Attorney

INSTRUCTION NO. 15

Each count of the indictment charges a separate crime against Mr. Loughrin. You must separately consider the evidence on each count and your verdict on one count, whether or not it is guilty, should not influence your verdict on the other counts, whether it is guilty or not guilty, unless I explain otherwise.

INSTRUCTION NO. 16

In the first six counts of the indictment, Mr. Loughrin is charged with bank fraud and aiding and abetting in the offense. I am now going to explain to you what the United States must prove, beyond a reasonable doubt, for you to find that Mr. Loughrin is guilty. Remember, the United States must prove each part, or element for each of the six allegations. And also remember, as I told you earlier, a separate crime is charged against Mr. Loughrin in each count of the indictment. You must separately consider the evidence on each count and your verdict on one count, whether or not it is guilty, should not influence your verdict on the other counts, unless I explain otherwise.

INSTRUCTION NO. 17

The defendant is charged in counts 1 through 6 with violations of 18 U.S.C. section 1344, bank fraud.

This law makes it a crime to execute or attempt to execute a scheme or artifice to obtain any money or other property of a financial institution by means of false or fraudulent pretenses, representations or promises.

To find Mr. Loughrin guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: Mr. Loughrin knowingly executed or attempted to execute a scheme or artifice to obtain money or property from the particular bank or credit union named in the indictment by means of false or fraudulent pretenses, representations, or promises;

Second: that the particular bank or credit union was a financial institution within the meaning of the law; in this case that means that the government must prove that the bank or credit union was insured by either the Federal Deposit Insurance Corporation or the National Credit Union Association with funds from the National Credit Union Share Insurance Fund;

Third: Mr. Loughrin acted with intent to defraud; and

Fourth: that the false or fraudulent pretenses, representations, or promises that Mr. Loughrin made were material, meaning they would naturally tend to

influence, or were capable of influencing the decision of the particular bank or credit union.

A "scheme or artifice to defraud" includes any design, plan, pattern or course of action, including false and fraudulent pretenses and misrepresentations, intended to deceive others in order to obtain something of value, such as money, from the institution to be deceived.

A defendant acts with the requisite "intent to defraud" if the defendant acted knowingly and with the specific intent or purpose to deceive, ordinarily for the purpose of causing some financial loss to another or bringing about some financial gain to the defendant.

A statement or representation is "false" or "fraudulent" if it is known to be untrue or is made with reckless indifference to its truth or falsity.

INSTRUCTION NO. 18

In counts 7 and 8, Mr. Loughrin is charged with aggravated identity theft and aiding and abetting in the commission of that crime. Although you must consider each of these two counts separately, and for each of these two counts, the government must prove each of the elements beyond a reasonable doubt, you will notice that each of these two counts refers back to a previous count: count seven refers to the bank fraud charge of count three; count eight refers to the bank fraud charge of count four.

In order for you to find Mr. Loughrin guilty of Counts 7 and 8 of the indictment, Aggravated Identity Theft, for each particular count you must find that the government has proven beyond a reasonable doubt all of the following elements:

First: that the defendant knowingly possessed or used, without lawful authority, a means of identification of another person;

Second: that the possession or use of the means of identification of another person was during and in relation to the commission of bank fraud as alleged in the indictment.

The words "possess" and "use" are given their common, everyday meaning.

The term "without lawful authority" means that the means of identification was possessed or used (1) without the permission of the person to whom it belongs, (b) in a manner the person to whom it

belongs was not entitled to authorize, or (c) in a manner that was itself unlawful.

The government must prove that the defendant knew that the means of identification possessed or used belonged to another individual.

The second element that the government must prove beyond a reasonable doubt is that the defendant possessed or used the means of identification during and in relation to the bank fraud alleged in counts 3 and 4. The phrase "during and in relation to" means that the possession or use of the means of identification of another person played an integral part in the bank fraud, or that it had a role in, facilitated (that is, made easier), or had the potential of facilitating the bank fraud.

The term "means of identification" means any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual, including any name, social security number, date of birth, official State or government issued driver's license or identification number, alien registration number, government passport number, employer or tax identification number; unique biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation; unique electronic identification number, address, or routing code; or telecommunication identifying information or access device (as defined in section 1029(d)).

INSTRUCTION NO. 19

Count 9 alleges that Mr. Loughrin is guilty of possession of stolen mail, and aiding and abetting in the commission of that offense. To prove that Mr. Loughrin is guilty of this offense, the United States must prove each of the following elements beyond a reasonable doubt:

First: Mr. Loughrin possessed stolen mail;

Second: the mail was stolen from a mail receptacle or mail route; and

Third: Mr. Loughrin knew the mail was stolen.

Mail is "'stolen" when it has been wrongfully taken with the intent to deprive the owner, temporarily or permanently, of its use and benefit. It is not necessary that Mr. Loughrin knew the matter was stolen from the mail so long as he knew that it was stolen.

INSTRUCTION NO. 20

Each count of the indictment also charges a violation of 18 U.S.C. § 2, which provides that: "Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces or procures it [sic] commission, is punishable as a principal."

This law makes it a crime to intentionally help someone else commit a crime. To find Mr. Loughrin guilty of aiding and abetting, you must be convinced that the government has proved each of the following beyond a reasonable doubt for each particular count:

First: someone committed the charged crime, and

Second: Mr. Loughrin intentionally associated himself in some way with the crime and intentionally participated in it as he would in something he wished to bring about. This means that the government must prove that Mr. Loughrin consciously shared the other person's knowledge of the underlying criminal act and intended to help that person.

Mr. Loughrin need not perform the underlying criminal act, be present when it is performed, or be aware of the details of its commission to be guilty of aiding and abetting. But a general suspicion that an unlawful act may occur or that something criminal is happening is not enough. Mere presence at the scene of a crime and knowledge that a crime is being committed are also not sufficient to bring establish aiding and abetting.

INSTRUCTION NO. 21

The term "knowingly," as used in these instructions to describe Mr. Loughrin's alleged state of mind, means that he was conscious and aware of his actions, realized what he was doing or what was happening around him, and did not act because of ignorance, mistake, or accident.

Although the knowledge that a person possesses at any given time may not ordinarily be proved directly because there is no way of directly scrutinizing the workings of the human mind, you may consider evidence of Mr. Loughrin's words, acts, or omissions, along with all of the other facts and circumstances in evidence, in deciding whether Mr. Loughrin acted knowingly.

* * * * *

PETITIONER'S BRIEF

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IN THE

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KEVIN LOUGHRIN,

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v.

UNITED STATES OF AMERICA

Respondent.

On a Writ of Certiorari to
the United States Court of Appeals
for the Tenth Circuit

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QUESTION PRESENTED

Whether the Government must prove that the defendant intended to defraud a bank and expose it to risk of loss in every prosecution under 18 U.S.C. § 1344.

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BRIEF FOR THE PETITIONER

Petitioner Kevin Loughrin respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is reported at 710 F.3d 1111.

JURISDICTION

The court of appeals entered judgment on March 8, 2013. Pet. App. 1a. Petitioner filed a timely petition for a writ of certiorari on September 9, 2013, which this Court granted on December 13, 2013. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The provisions of 18 U.S.C. §§ 20, 513, 1341, 1343, 1344, and 31 U.S.C. § 3729 are reproduced in relevant part as appendices to this brief.

STATEMENT OF THE CASE

I. Factual Background

On several occasions in 2009, petitioner Kevin Loughrin and his codefendant Theresa Thongsarn stole merchandise and cash from Target and other retail stores. R. at 102-05.[1] At times, they looked for discarded receipts in the Target parking lot, took the

---

[1] "R." refers to Volume IV of the Record on Appeal, electronically filed on September 6, 2011 (Document No. 01018706266).

items listed on the receipts from store shelves, and "returned" them for cash. R. at 120-21. At other times, petitioner and his accomplice used checks they had stolen from outgoing mail in residential neighborhoods to pay for food and other merchandise. R. at 100-04, 119-20. They crudely altered the checks by crossing out the designated payee and amount, then writing in "Target" and a new amount next to or above the original text. R. at 70, 76-78, 82-84, 89, 118-19, 123-24, 155-57, 179. They often returned some of the items for cash immediately after checking out, sometimes without even leaving the store. R. at 55.

Target was an appealing victim because its cashiers were not trained to detect fraudulent checks. R. at 124-25, 214. Instead, at a later point Target Loss Prevention Agents reviewed all checks to detect forgeries and alterations before submitting them for payment to a bank. R. at 140. In this case, Target detected most of petitioner's clumsy alterations. R. at 140, 154, 179-80, 191-92, 210, 215, 240. Target staff used security footage to connect the checks to petitioner and his accomplice. R. at 175-79, 198-207. During their next visit, a Loss Prevention Agent called the local police, who arrested them when they attempted to use an altered check to pay for merchandise. R. at 240-45. Agents of the U.S. Postal Inspection Services subsequently arrested petitioner for possession of stolen mail.

II. The District Court Proceedings

In addition to charging petitioner with possession of stolen mail, federal prosecutors charged him with two counts of aggravated identity theft and six counts of bank fraud (representing six altered

checks totaling $1,184.53).[2] *See* J.A. 1-4. The bank fraud statute, 18 U.S.C. § 1344, provides:

> **Bank fraud**
>
> Whoever knowingly executes, or attempts to execute, a scheme or artifice –
>
> (1) to defraud a financial institution; or
>
> (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;
>
> shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

At trial, the Government did not claim that petitioner had ever obtained money or property directly from a bank. Instead, the prosecution's theory relied on the fact that, although petitioner had schemed to obtain merchandise and money from Target (not a bank), he obtained that money and property by presenting Target with altered checks written on accounts at financial institutions. R. at 287-89. Even so, the evidence established that petitioner's conduct never posed any risk of financial loss to a bank. R. at 256-57. Target Loss Prevention Agents noticed the obvious alterations and did not forward most of the checks to financial institutions. R. at 60-61, 140, 154, 220, 236. Additionally, one of the Government's witnesses, an Operational Risk

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[2] Thongsarn pled guilty and testified against petitioner at trial. R. at 98-99.

Consultant for Wells Fargo, testified that if a bank had honored one of the checks, Target, rather than the bank, would have been liable for any losses. R. at 165; Pet. App. 36a-37a; *see also, e.g.*, *J. Walter Thompson, U.S.A., Inc. v. First Bank Americano*, 518 F.3d 128, 131-32 n.2 (2d Cir. 2008) ("The loss associated with an altered check typically rests with the party who took it from the wrongdoer.") (emphasis omitted).

At the close of the Government's case, petitioner moved for acquittal pursuant to Federal Rule of Criminal Procedure 29. Pet. App. 35a. The court granted the motion in part. *Id.* The court found, and the Government accepted, that there was "simply nothing" in the evidence to "show risk of loss or putting a bank, a financial institution, at risk." *Id.* 37a. And the court held that under Tenth Circuit precedent, risk of loss to a bank is required to prove that a defendant "defraud[ed] a financial institution" within the meaning of the first subsection of Section 1344. *Id.* 36a (citing *United States v. Sapp*, 53 F.3d 1100 (10th Cir. 1995)). Accordingly, the court precluded the government from proceeding under the first subsection of Section 1344. *Id.* 35a-38a.

However, the district court construed prior Tenth Circuit precedent to establish that subsection (2) creates a separate offense. And under that precedent, the court believed, risk of loss to a financial institution is not required to prove that a defendant attempted "to obtain any of the moneys . . . or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises" within the meaning of subsection (2). Pet. App. 36a.

Accordingly, the court allowed the case to go to the jury under that subsection. *Id.* 36a-38a.

Petitioner subsequently requested jury instructions requiring the Government to prove that he acted with "intent to defraud a *financial institution*," Pet. App. 43a (emphasis added), and to cause some "financial loss to a financial institution," *id.* 45a. The district court rejected both requests. *Id.* 43a-46a. Instead, believing that the statute required only that the defendant have intended to defraud *someone*, the court instructed the jury simply that petitioner must have "acted with intent to defraud." J.A. 7.

The Government relied on this instruction in its closing argument, emphasizing that intent to defraud a financial institution was not required under the jury instruction given:

> You might recall that [petitioner] said he was hoping to take money from Target. He wanted to defraud Target, not a bank. That doesn't matter. That's also not in your instructions. The instructions say that he had to have the intent to defraud. He had to have a fraudulent intent. He did not have to intend to defraud the bank. He did not have to have a scheme to defraud the bank.

R. at 317.[3] The prosecutor argued that the only question was whether petitioner "intended to defraud *somebody*." R. at 292 (emphasis added). And when

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[3] Petitioner's certiorari reply brief incorrectly identified the trial court, rather than the Government, as the source of portions of these statements. Cert. Reply 3-4 n.1.

defense counsel attempted to argue in closing that "there was no scheme to defraud a bank," the district court stopped him. R. at 303.

The jury found petitioner guilty on all counts. R. at 328-29. The district court summarily denied petitioner's motion for a judgment notwithstanding the verdict and sentenced him to 36 months in prison followed by 60 months of supervised release. R. at 363-64. The court further ordered petitioner to pay restitution to Target. Pet. App. 30a-31a. No restitution was ordered for any financial institution. *Id.*

III. The Court Of Appeals' Decision

On appeal, the Tenth Circuit affirmed, rejecting petitioner's challenges to the jury charge and the sufficiency of the evidence. Pet. App. 2a. Neither the Government nor the Tenth Circuit questioned petitioner's assertion that he did not intend to defraud a bank or the district court's finding that the scheme did not pose a risk of loss to any bank. *See* Pet. App. 6a; U.S. C.A. Br. § II. Nonetheless, the Tenth Circuit affirmed because, in its view, neither intent to defraud a bank nor risk of loss is required to prove bank fraud under Section 1344.

The court acknowledged that to prove a scheme to "defraud a financial institution" under subsection (1), the Government must prove that the defendant intentionally directed his scheme at a bank and created a risk of loss to that bank. Pet. App. 5a. But the court explained that, under settled circuit precedent, the two subsections are treated as "separate" albeit "largely overlapping" offenses. Pet. App. 4a. (quoting *United States v. Swanson*, 360 F.3d 1155, 1162 (10th Cir. 2004)). And under that

precedent, the court held, "an individual can violate § 1344(2) by obtaining money from a bank while intending to defraud someone else." *Id.* 5a-6a. Thus, in this case, the court concluded that "the government satisfied the fraudulent intent requirement of § 1344(2) with proof that Loughrin intended to defraud Target rather than a bank." *Id.* 6a.

The court further held that a "conviction under § 1344(2) requires no proof that a bank was 'at risk' because there is no explicit requirement that a particular bank be defrauded." Pet. App. 5a. Accordingly, the court held, the "fact that Loughrin fraudulently obtained funds using bank checks, even though the bank was not at risk of loss, is sufficient to support his conviction for bank fraud." *Id.* 7a.

The Tenth Circuit acknowledged that its interpretation of Section 1344 "conflict[s] with the decisions of several circuits" and "may cast a wide net for bank fraud liability." Pet. App. 6a-7a. However, the court found itself "bound by [past] cases 'absent *en banc* reconsideration or a superseding contrary decision by the Supreme Court.'" Pet. App. 7a. (quoting *United States v. Meyers*, 200 F.3d 715, 720 (10th Cir. 2000)). The Tenth Circuit subsequently denied petitioner's petition for rehearing en banc, Pet. App. 50a-51a, and this Court granted certiorari.

SUMMARY OF ARGUMENT

To defraud a bank within the meaning of the federal bank fraud statute, a defendant must intend to defraud a bank; it is not enough that the defendant intended to defraud *someone* as the Tenth Circuit wrongly held below. Likewise, a scheme to defraud *someone* is not converted into bank fraud simply because the defendant obtains the victim's funds from a bank account or otherwise uses a bank in a way that poses no risk to the bank's own financial or property interests.

I. The federal bank fraud statute criminalizes schemes "(1) to defraud a financial institution; or (2) to obtain any of the moneys . . . or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. § 1344. Everyone acknowledges that to "defraud a financial institution" within the meaning of subsection (1), the defendant must intend to defraud a financial institution. The question here is whether subsection (2) operates to relieve the Government of that burden. It does not, for two reasons.

First, despite appearances, the bank fraud statute defines a single offense, the essence of which is schemes to defraud financial institutions, as set forth in the first subsection. The second subsection simply sets out one kind of fraud on a bank that is already encompassed by the first. That understanding arises from the history of the mail fraud statute, which was the model for the bank fraud statute and is the source of the statute's disjunctive two-clause structure. This Court has explained that the second clause of the mail fraud

statute simply codified the Court's earlier construction of the first clause; it did not establish a second offense or a means for the Government to avoid the restrictions of the first clause.

Second, even if the second clause were viewed as a separate offense, nothing in its language or the purposes of the statute warrants reading it to permit the Government to convict a defendant of bank fraud without proving he intended to defraud a bank. Consistent with the first subsection, subsection (2) expressly requires proof that the defendant sought to obtain property owned by, or in the custody or control of, *a bank*. And although it does not state to whom the required false representations must be made, the overall structure and purposes of the statute make clear that Congress intended to criminalize only false statements that target a bank. Congress did not intend to enact a sweeping anti-fraud provision that applies whenever a bank is used as an instrumentality for a fraudulent scheme targeting someone else.

Reading the statute to require intent to defraud a bank also better comports with the purpose of the statute, which was to fill a gap in federal law that required the Government to prosecute frauds that victimized banks under statutes that were not specifically designed for that task. Congress's concern was with the victimization of banks, not with the use of banks to victimize others.

To read the statute otherwise would effect a sweeping expansion of federal criminal jurisdiction at the expense of traditional state authority, in conflict with the principles of lenity this Court has often

relied upon to reject broad readings of other federal criminal fraud statutes.

The Government wrongly suggests that even if intent to defraud a bank is required, use of an altered check is sufficient to prove it. While some uses of altered checks – for example, cashing a counterfeit check at a bank – plainly show intent to defraud a bank, other uses do not. In this case, for example, the altered checks were used to obtain merchandise and money from *Target*, not a bank. It made no difference to petitioner whether Target ever sent the obviously altered checks to a bank, or whether a bank ever honored them. Furthermore, a different federal statute, 18 U.S.C. § 513, already criminalizes the use of forged or altered checks. There is no need to stretch the bank fraud statute to do the same work.

II. Bank fraud typically involves schemes that create a risk of financial loss to a bank through attempts to obtain the bank's own money or property (*e.g.*, fraudulent loan applications, check kiting, or embezzlement by bank employees). If the statute is read more broadly to encompass schemes directed at bank *customers*, the Court should nonetheless limit the statute to schemes traditionally understood as constituting "fraud" on a specified victim – that is, the Court should insist that the Government prove that the scheme pose at least a risk of injury to the bank's own property interests. That reading accords with this Court's repeated narrow interpretations of the kinds of property interests protected by the mail and wire fraud statutes in order to avoid giving them unintended breadth at the expense of state criminal authority.

ARGUMENT

The "starting point in every case involving construction of a statute is the language itself." *Kelly v. Robinson*, 479 U.S. 36, 43 (1986) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975)) (internal quotation marks omitted). In this case, 18 U.S.C. § 1344 provides:

> **Bank fraud**
>
> Whoever knowingly executes, or attempts to execute, a scheme or artifice –
>
> (1) to defraud a financial institution; or
>
> (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;
>
> shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

As this Court has explained, "to defraud" someone has long been understood to mean depriving a victim "of something of value by trick, deceit, chicane, or overreaching." *McNally v. United States*, 483 U.S. 350, 358 (1987) (quoting *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924)) (internal quotation marks omitted). Accordingly, the Tenth Circuit – along with many other courts of appeals – has held that to prove that a defendant schemed to "defraud a financial institution," 18 U.S.C. § 1344, the Government must prove that the defendant (a) intended to defraud a bank, and (b) exposed the bank

to a risk of financial or other property loss. Pet. App. 4a-5a.[4] These two requirements are easily satisfied in paradigmatic bank fraud cases, in which the defendant targets a bank for deception in order to obtain a loan, embezzle bank funds, engage in check kiting, or otherwise obtain the bank's own property.

In this case, however, the Tenth Circuit concluded that the Government can avoid having to prove either of the essential elements of ordinary bank fraud by charging the defendant under subsection (2) of the bank fraud statute. *See* Pet. App. 5a-6a. Under that interpretation, a defendant can commit federal bank fraud without ever intending to defraud a bank, through a scheme that poses no risk of financial or other property loss to a bank.

As the court of appeals openly acknowledged, that interpretation of Section 1344 is exceedingly broad, encompassing numerous state-law crimes that have only glancing relevance to the federal interest in protecting the financial integrity of financial institutions. It should come as no surprise, then, that the interpretation is also wrong. Intent to defraud a bank is the *sine qua non* of every bank fraud prosecution, a requirement that cannot be avoided by charging a defendant under the second subsection of Section 1344 rather than the first.

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[4] *See, e.g.*, *United States v. Ayewoh*, 627 F.3d 914, 921 (1st Cir. 2010); *United States v. Morganfield*, 501 F.3d 453, 465 (5th Cir. 2007); *United States v. Thomas*, 315 F.3d 190, 197 (3d Cir. 2002); *United States v. Brandon*, 298 F.3d 307, 311-12 (4th Cir. 2002); *United States v. Davis*, 989 F.2d 244, 247 (7th Cir. 1993); *United States v. Blackmon*, 839 F.2d 900, 904 (2d Cir. 1988).

Moreover, the statute cannot reasonably be read to encompass schemes to obtain money from a bank customer simply because the funds are held in a bank account when the scheme does not otherwise pose a risk to the financial or other property interests of a covered financial institution.

I. To Prove Bank Fraud Under Section 1344, The Government Must Prove That The Defendant Intended To Defraud A Bank.

The text and history of the federal bank fraud statute establish that intent to defraud a bank is an essential element of the offense of bank fraud. Congress's purpose for enacting the statute, protecting the financial integrity of federally related financial institutions, affirms that natural reading of the text. And if there is any lingering doubt, it should be resolved in favor of the narrower reading under familiar canons of federalism and lenity. Indeed, it appears that the Government may even agree. *See* BIO 22 ("[T]he government has taken the position that Section 1344(2) is 'properly applied whenever a defendant deceives the bank in order to obtain funds under the bank's custody and control.'") (citation omitted).

A. The Text And History Of Section 1344 Establish That The Statute Applies Only When A Defendant Intended To Defraud A Financial Institution.

As noted above, the Tenth Circuit acknowledged that, by its plain text, the first subsection of the bank fraud statute – prohibiting schemes to "defraud a financial institution" – obviously requires the Government to prove that the defendant intended to

defraud a bank. Pet. App. 5a. The court's conclusion that intent to defraud a bank is not *always* required under Section 1344 was premised on two assumptions. First, the court believed that the two subsections of Section 1344 define separate criminal offenses. *Id.* 4a. Second, the court concluded that the second subsection dispenses with the essential feature of bank fraud – intent to defraud a bank in order to obtain its property – required by the first. *Id.* 5a-6a. Both premises are incorrect. In fact, the history of the statute and this Court's decisions make clear that the text establishes a single offense, the essential features of which are set forth in subsection (1). *See United States v. Thomas*, 315 F.3d 190, 197-98 (3d Cir. 2002).[5] Moreover, even if subsection (2) establishes an independent offense, it is properly read to reach only schemes intended to defraud a bank, not all frauds that happen to touch upon bank deposits or use bank instruments. *See, e.g., United States v. Kenrick*, 221 F.3d 19, 28-29 (1st Cir. 2000) (en banc) (concluding that although "§ 1344(2) provides an alternative to . . . a 'scheme or artifice to

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[5] Although courts tend to formulate the issue as whether the different subsections establish separate "offenses," *see, e.g., Cleveland v. United States*, 531 U.S. 12, 25-26 (2000), the question is not whether the subsections define distinct offenses for Double Jeopardy or multiplicity purposes. *See, e.g., United States v. Blockburger*, 284 U.S. 299 (1931). The question here is whether subsection (2) establishes an independent means for the Government to prove bank fraud that dispenses with the essential element of intent to defraud a bank, which everyone agrees is requirement under subsection (1). For ease of exposition, however, this brief will use the settled terminology and discuss whether the subsections establish separate offenses.

defraud' in violation of § 1344(1)," the "intent element of bank fraud under either subsection is an intent to deceive the bank in order to obtain from it money or other property").

1. Section 1344 Defines A Single Offense That Requires Intent To Defraud A Bank.

Although it may be natural to assume that the separately numbered clauses in Section 1344 define independent offenses, the history of the statute and this Court's prior decisions make clear that they do not. The two-clause structure of Section 1344 is a carryover from the mail and wire fraud statutes, upon which the bank fraud statute was based. And this Court has long construed the mail fraud statute to establish a single offense, with the second subsection simply clarifying and codifying what is already encompassed within the first clause, rather than providing a means for the Government to avoid proving the essential elements of the first clause. There is no basis for reading Section 1344 any differently. As a consequence, the Government may not avoid having to prove intent to defraud a bank by proceeding under subsection (2).

a. Before Congress passed Section 1344, the federal criminal code lacked "a unitary provision aimed directly at the problem of bank fraud." S. Rep. No. 98-225, at 378 (1983). Prosecutors instead relied on other federal laws not designed to address bank fraud, including those covering embezzlement, robbery, larceny, burglary, false statements, and mail and wire fraud. *Id.* at 377, 379; H.R. Rep. No. 98-901, at 2-3 (1984).

To address this problem, Congress enacted Section 1344, modeled on the existing mail fraud statute. *Neder v. United States*, 527 U.S. 1, 20-21 (1999). At the time, the mail fraud statute provided:

> **Frauds and swindles**
>
> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service . . . shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. § 1341 (1982 ed.).[6] The mail fraud statute thus prohibited schemes described in two disjunctive clauses: (1) schemes "to defraud," or (2) schemes "for obtaining money or property by means of false or fraudulent pretenses." *Id.*

Congress carried over the two-clause, disjunctive structure into the bank fraud statute but limited the statute to schemes targeting federally related financial institutions:

> **Bank fraud**
>
> Whoever knowingly executes, or attempts to execute, a scheme or artifice –

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[6] The full text of the statute as it existed when the bank fraud statute was passed is reproduced as Appendix F to this brief.

> (1) to defraud a *federally chartered or insured financial institution*; or
>
> (2) to obtain any of the moneys, funds, credits, assets, securities or other property owned by or under the custody or control of a *federally chartered or insured financial institution* by means of false or fraudulent pretenses, representations, or promises, shall be fined not more than $10,000, or imprisoned not more than five years, or both.

Pub. L. 98-473, Tit. II, § 1108(a), 98 Stat. 1837, 2147 (emphasis added).[7]

b. This Court has repeatedly held that the two-clause, disjunctive structure of the mail fraud statute establishes a single offense, the essential elements of which are set forth in the first clause proscribing schemes and artifices "to defraud." That conclusion flows in significant part from the history of the statute.

The Court explained in *McNally v. United States*, 483 U.S. 350 (1987), that as originally enacted in 1872, the mail fraud statute did not include its

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[7] The full text of the statute as originally enacted is reproduced as Appendix C to this brief. Congress has amended Section 1344 twice, changing its penalty and replacing "federally chartered or insured financial institution" with the term "financial institution," which is defined in 18 U.S.C. § 20 to include a list of federally insured, chartered, regulated and other federally related financial institutions. *See* Crime Control Act of 1990, Pub. L. No. 101-647, § 2504(j), 104 Stat. 4789, 4861; Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, §§ 961(k), 962(e)(2), 103 Stat. 183, 500, 503-04.

second clause; instead, the provision only proscribed the use of the mails to further "any scheme or artifice to defraud." *Id.* at 356.[8] In the first case in which it considered the meaning of the new statute, *Durland v. United States*, 161 U.S. 306 (1896), the Court adopted a broad reading of this language, "construfing] the statute to 'includ[e] everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future.'" *McNally*, 483 U.S. at 356-57 (second alteration in original) (quoting *Durland*, 161 U.S. at 511).[9]

In 1909, Congress amended the mail fraud statute to add the second clause, "add[ing] the words 'or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises' after the original phrase 'any scheme or artifice to defraud.'" *McNally*, 483 U.S. at 357 (quoting Act of Mar. 4, 1909, ch. 321, § 215, 35 Stat. 1088, 1130) (internal quotation marks omitted).[10]

Initially, some lower courts inferred from the statute's new disjunctive phrasing that Congress had established two separate criminal offenses. *McNally*,

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[8] The full text of the statute as originally enacted is reproduced as Appendix E to this brief.

[9] The petitioner in *Durland* was convicted for a scheme to sell bonds by promising significant returns, a promise he never intended to honor. 161 U.S. at 509. Arguing that mail fraud was limited to common law false pretenses (*i.e.*, false statements about the past or present), the petitioner asserted he could not be convicted for promises as to the future. *Id.*

[10] The full text of the amended statute in its current form is reproduced as Appendix D to this brief.

483 U.S. at 358. But this Court disagreed. While noting that "it is arguable that [the two clauses] are to be construed independently," the Court concluded that the amendment was better understood as "codif[ying] the holding of *Durland*." *Id.* at 357. The new language "simply made it unmistakable that the statute reached false promises and misrepresentations as to the future as well as other frauds involving money or property." *Id.* at 359.[11]

Although that interpretation arguably rendered the second clause surplusage, the Court nonetheless concluded that it was correct in light of the statutory history, reinforced by principles of lenity and federalism, which precluded giving the statute a broader interpretation that would expand the encroachment of federal criminal authority on the traditional jurisdiction of the states without a clear indication from Congress. *See id.* at 359-60.

This Court "reaffirm[ed]" *McNally*'s reading of the mail fraud statute in *Cleveland v. United States*, 531 U.S. 12 (2000). The Government argued in *Cleveland* that disjunctive clauses of the mail fraud statute "define[] two independent offenses," with the second clause providing a basis for prosecution of conduct that does not satisfy the elements of the first.

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[11] In *McNally*, this Court considered whether "the mail fraud statute proscribes schemes to defraud citizens of their intangible rights to honest and impartial government." 483 U.S. at 355. This Court held that it did not, *id.* at 356, despite the Government's argument that "the money-or-property requirement of the [second clause] does not limit schemes to defraud [*i.e.*, schemes prohibited by the first clause] to those aimed at causing deprivation of money or property," *id.* at 358.

Id. at 25.[12] This Court, however, rejected this argument and reaffirmed that the mail fraud statute defines a single offense, explaining again that the second clause "simply modifies the first." *Id.* at 26. The Court further explained that the Government's interpretation was untenable because "[w]ere the Government correct that the second phrase of § 1341 defines a separate offense, the statute would arm federal prosecutors with power to police false statements in an enormous range" of circumstances. *Id.* at 24. Relying on principles of federalism and lenity, the Court "decline[d] to attribute to § 1341 a purpose so encompassing where Congress has not made such a design clear." *Id.* at 26.

c. The Tenth Circuit's conclusion that the parallel structure of Section 1344 nonetheless establishes two offenses, the second of which dispenses with the essential elements of the first, cannot be reconciled with these precedents. Both the

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[12] The primary dispute in *Cleveland* was whether the mail fraud statute reached false statements in an application for a state poker license. 531 U.S. at 15. The Court concluded it did not violate the first clause because a "scheme to defraud" requires an attempt to obtain the property of the victim and, the Court held, a state license does not count as property while in the hands of the a state government. *Id.* Nevertheless the Government argued that the license was property in the hands of the recipient. *Id.* at 25-26. And because the second clause of Section 1341 criminalizes schemes to "obtain[] . . . property" through false representations, the United States argued it should be interpreted to encompass the defendant's scheme to obtain poker licenses from the state through false statements, even if that conduct did not amount to a scheme "to defraud" the state under the first clause. *Id.*

wire and bank fraud statutes are lineal descendants of the mail fraud statute, and this Court has previously construed the common features of all three statutes in tandem. *See Neder*, 527 U.S. at 20-21 (giving identical interpretation to all three statutes with respect to the materiality requirement); *see also* H.R. Rep. No. 98-901, at 4 (explaining that Congress expected the bank fraud statute to be construed consistently with mail and wire fraud statutes).[13]

None of the linguistic differences between the bank fraud statute and the mail and wire fraud statutes undermine this conclusion. In adapting the language of the mail fraud statute in Section 1344, Congress made two primary changes. First, it changed the federal jurisdictional hook from one based on the use of a particular *instrumentality* of interstate commerce (the mail or wires) to one based on targeting a particular *victim* (a federally related financial institution). *Compare* 18 U.S.C. § 1344, *with id.* § 1341; *see also* S. Rep. No. 98-225, at 378-79. But that difference only reinforces that Congress intended the bank fraud statute to be limited to cases that involve attempts to defraud *a bank*, not schemes to defraud a third party that involve the use of a bank in some tangential way. As the Senate Report explained, "[w]hile the basis for Federal jurisdiction in [the mail and wire] fraud statutes is the use of the

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[13] That the bank fraud statute was enacted before this Court's decision in *McNally* is immaterial. The Court in *McNally* did not transform the mail fraud statute into a unitary provision in 1987; it was interpreting the statute as it had existed since 1909, well before the enactment of Section 1344. *See McNally*, 483 U.S. at 357-58 & n.6.

mails or wire communications, in the proposed offense, jurisdiction is based on the fact that the *victim of the offense is a federally controlled or insured institution*." S. Rep. No. 98-225, at 378 (emphasis added); *see also United States v. Thomas*, 315 F.3d 190, 197-98 (3d Cir. 2002) (legislative history indicates Section 1344 was intended to protect banks as victims).

Second, whereas the second clause of the mail and wire fraud statutes refers to schemes to obtain the victim's "money or property," 18 U.S.C. §§ 1341, 1343, the second clause of the bank fraud statute includes a more tailored list of property interests specific to the banking context, *i.e.*, "moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution," *id.* § 1344(2). Even if this list somehow broadened the class of property interests protected by the statute, the list still refers to property interests *of a bank*. The change thus only reinforces Congress's focus on protecting covered financial institutions from victimization by fraud.

d. Like the mail and wire fraud statutes, Section 1344 thus establishes a single offense, the essence of which is scheming "to defraud a financial institution" as proscribed in subsection (1). As in the mail and wire fraud statutes, the second subsection of the bank fraud statute simply clarifies what was already implicit in the first, making it "unmistakable that the statute reached false promises and misrepresentations as to the future as well as other frauds involving money or property." *McNally*, 483 U.S. at 359. It does not "indicate that Congress was departing from [the] common understanding," *id.*, of

what it means to defraud a financial institution. Accordingly, just as in *McNally* and *Cleveland*, the Government cannot sidestep the requirements of the statute's principle clause by pleading its case under subsection (2) – it must prove that a financial institution was the intended victim of a defendant's fraud in every prosecution under Section 1344.

2. *Even If Section 1344 Defines Two Separate Offenses, Nothing In The Language Of Section 1344(2) Suggests That Congress Intended To Dispense With The Requirement That The Defendant Intend To Defraud A Bank.*

Even if this Court construes the subsections of the bank fraud statute to establish separate offenses, the language of Section 1344(2) is not sensibly read to dramatically depart from the traditional conception of bank fraud criminalized in subsection (1).

As noted above, it is widely acknowledged that subsection (1) of the bank fraud statute requires proof that the defendant (a) intended to deceive a bank (b) in order to obtain bank property. *See supra* pp. 11-12 & n.4; BIO 22; *cf. McNally*, 483 U.S. at 358 (describing traditional elements of fraud). Those two requirements easily map onto the plain language of subsection (2). The provision reaches only schemes involving "false or fraudulent pretenses, representations, or promises," 18 U.S.C. § 1344(2), words that describe common modes of intentional fraud, *see McNally*, 483 U.S. at 358-59. And by its terms, the provision is limited to schemes directed at "obtain[ing] any of the moneys" or other "property" owned by, or in the custody or control of, a bank. 18 U.S.C. § 1344(2).

To be sure, the provision does not say expressly to whom the false representations must be directed. But the statutory *silence* hardly suffices to overcome the natural implications of the statute's title ("Bank fraud") and the requirement that the object of the scheme must be obtaining property of a bank, both of which strongly imply that the intended target of the scheme must be a financial institution, not merely someone who happens to have a bank account. *See, e.g., United States v. Laljie*, 184 F.3d 180, 189-90 (2d Cir. 1999) ("Because § 1344 focuses on the bank, rather than on other potential victims, a conviction under § 1344 is not supportable by evidence merely that some person other than a federally insured financial institution was defrauded in a way that happened to involve banking, without evidence that such an institution was an intended victim."); *United States v. Thomas*, 315 F.3d 190, 198 (3d Cir. 2002) ("[T]he intent-to-victimize requirement of subsection (1) pervades the statute, and is a necessary element of an indictment under either subsection (1) or (2).").[14]

The Tenth Circuit's contrary interpretation also cannot be squared with the statute's origins in the text of the mail and wire fraud statutes. On the court of appeals' view, subsection (2) effectively criminalizes any fraud in which a bank is used as an instrumentality in a fraudulent scheme. *See* Pet.

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[14] Nothing in the legislative history even hints that Congress intended substantially different scopes for the two subsections. *See, e.g.*, H.R. Rep. No. 98-901, at 4 (describing entire section as "address[ing] schemes to defraud financial institutions").

App. 5a; *see also, e.g.*, *United States v. Everett*, 270 F.3d 986, 991 (6th Cir. 2001) ("It is sufficient if the defendant in the course of committing fraud on someone causes a federally insured bank to transfer funds under its possession and control."). But if Congress had intended for *use of a bank* to substitute for *use of the mails* in the statute upon which it was modeled, Congress would have written the statute very differently. It would have punished, for example, "whoever, having devised a scheme or artifice to obtain money or property by means of false or fraudulent pretenses, representations, or promises, causes funds to be deposited, withdrawn, or transferred from, to, or among financial institutions." *Cf.* 18 U.S.C. § 1341. Instead, Congress omitted instrumentality language altogether and substituted in its place, as the federal jurisdictional hook, the intentional victimization of a federally related bank.

B. Requiring Intent To Defraud A Bank Best Accords With The Statute's Purposes.

Regardless of whether this Court views Section 1344 as creating one offense or two, the underlying purposes of the statute support reading the text to require proof of intent to defraud a bank in every prosecution.

As its title suggests, Congress enacted Section 1344 to prohibit *bank* fraud, not simply fraud against *someone* that tangentially touches upon a bank or its deposits. *See Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) ("[T]he title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute." (internal quotation marks omitted)). The purpose of

the statute was to fill a gap in existing fraud statutes that left financial institutions unprotected from some forms of fraudulent conduct, such as check kiting, that were directed at, and risked imposing financial harm upon, financial institutions connected to the federal government. S. Rep. No. 98-225, at 377-78 (explaining that the provision was intended to "assure a basis for Federal prosecution of those who victimize [federally regulated or insured] banks").

The legislative history is thus replete with explanations that this statute was enacted to protect banks from schemes in which the bank itself was the intended victim. *See, e.g.*, S. Rep. No. 98-225, at 377 ("The offense of bank fraud in this part is designed to provide an effective vehicle for the prosecution of frauds *in which the victims are financial institutions* that are federally created, controlled or insured.") (emphasis added); *id.* at 378 ("[J]urisdiction is based on the fact that the *victim of the offense is a federally controlled or insured institution*. . . .") (emphasis added); H.R. Rep. No. 98-901, at 2 (explaining that the statute was enacted, despite current laws prohibiting bank theft and false statements to banks, because those provisions did "not extend to fraudulent schemes *where banks are victims* unless the specific elements of false statement or theft crimes are met") (emphasis added).

Congress recognized that frauds that victimize banks implicate a "strong Federal interest in protecting the *financial integrity* of these institutions." *See* S. Rep. No. 98-225, at 377 (emphasis added). Many of the covered institutions are federally insured, *see* 18 U.S.C. § 20(1)-(2), and others have important roles in the national economy,

see, e.g., *id.* § 20(7) (defining covered financial institutions to include "a Federal Reserve Bank or a member bank of the Federal Reserve System"). The Tenth Circuit's interpretation unmoors the statute from this central purpose, permitting bank fraud prosecutions in cases that have little or nothing to do with victimization of banks.

C. This Court Should Avoid Giving The Criminal Bank Fraud Statute Unnecessary Breadth.

This Court has repeatedly avoided constructions of federal fraud statutes that would "approve a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress," both to avoid unintended incursions on state sovereignty and to implement the venerable rule of lenity. *Cleveland*, 531 U.S. at 25-25 (mail fraud statute); *see also, e.g.*, *Skilling v. United States*, 130 S. Ct. 2896, 2932-33 (2010); *McNally*, 483 U.S. at 359-60 (same).

To see the enormous breadth of the statute as interpreted by the court of appeals, one need look only at the kinds of cases the Government has brought premised on the belief that intent to defraud a bank is not a necessary element of every bank fraud prosecution. Applying that interpretation, the Government has frequently brought bank fraud charges against defendants whose schemes involved use of a bank account or check, but were aimed at defrauding a bank customer, not the bank:

- ***United States v. Thomas*, 315 F.3d 190 (3d Cir. 2002):** A home health care aide convinced her elderly employer to sign checks for groceries and other valid purposes. The worker then

cashed the checks and pocketed most of the money instead of using the funds for their intended purposes.

- ***United States v. Rodriguez*, 140 F.3d 163 (2d Cir. 1998):** An accounts payable clerk filed fake vendor invoices with her employer, causing the company to issue valid checks to her friend for services that were never rendered. *See also, e.g.*, *United States v. Everett*, 270 F.3d 986 (6th Cir. 2001) (similar scheme); *United States v. Laljie*, 184 F.3d 180 (2d Cir. 1999) (same); *United States v. Briggs*, 939 F.2d 222 (5th Cir. 1991) (same).
- ***United States v. Hoglund*, 178 F.3d 410 (6th Cir. 1999):** A personal injury lawyer executed contingency fee agreements with his clients, promising to give them two-thirds of any money received. The attorney accepted settlements without consulting his clients, told the clients that their cases were still pending, and deposited the entire settlement amounts in his own bank accounts.
- ***United States v. Sprick*, 233 F.3d 845 (5th Cir. 2000):** A financial advisor deposited clients' funds into his own accounts and used them for personal expenses.
- ***United States v. Blackmon*, 839 F.2d 900 (2d Cir. 1988):** As part of a "pigeon drop" scheme, a con artist convinced elderly women to participate in a fake investment scheme. He persuaded the women to take cash out of their bank accounts, convert it to foreign currency, and give it to him to "invest."

The Court should reject such a "sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress." *Cleveland*, 531 U.S. at 24. The conduct at issue falls squarely within the traditional criminal jurisdiction of the state courts. *See, e.g.*, *State v. Barrick*, 46 P.3d 770, 772-73 (Utah Ct. App. 2002) (holding that the unauthorized alteration of the payee line of a money order is criminal under Utah Code Ann. § 76-6-501). And the Court has long required that any "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Cleveland*, 531 U.S. at 25 (citation omitted). That interpretative guide is "especially appropriate" when, as here, the statute provides a predicate for other offenses with particularly harsh penalties. *Id.* (explaining that the rule of lenity "is especially appropriate in construing" the mail fraud statute" because, "as this case demonstrates, mail fraud is a predicate offense under RICO and the money laundering statute") (citations omitted); 18 U.S.C. §§ 1961(1), 1963(a) (bank fraud also a predicate for RICO, which carries a twenty-year maximum sentence); 18 U.S.C. § 1028A (bank fraud a predicate for aggravated identity theft, which imposes a mandatory two-year minimum sentence).

D. Use Of An Altered Check Is Not Sufficient, In Itself, To Prove Intent To Defraud A Financial Institution.

The Government has suggested that even if intent to defraud a bank is required, "negotiation of a forged or altered check to a merchant" is sufficient to prove that the defendant "intended to defraud the

bank on which the check is drawn." BIO 22. That suggestion is incorrect.[15]

1. The use of an altered check can, in some instances, amount to bank fraud. For example, a defendant who knowingly cashes an altered or counterfeit check at a bank quite plainly intends to defraud a bank by deceiving it into giving him the bank's money. *See, e.g.*, *United States v. Khorozian*, 333 F.3d 498, 503-06 (3d Cir. 2003).

But not every altered check is used to defraud a bank. This case is an example. Although petitioner used altered checks, his scheme was intended to obtain money from merchants, not from a bank. Indeed, at the time he obtained merchandise from Target using an altered check, the property he obtained – as well as the money he received when he returned merchandise for cash – belonged to *Target*, not to any bank. The scheme thus was not intended to "obtain any of the moneys" or other property

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[15] It is also does not change to the proper disposition of this case. Even if the use of an altered check might be sufficient evidence to permit a jury to infer an intent to defraud a bank, the jury was never asked to decide whether petitioner intended to defraud a bank in this case because the district court denied petitioner's request for an instruction requiring that finding. *See supra* p. 5. The Government has never argued that this error was harmless, either in the court of appeals, *see* U.S. C.A. Br. § II, or in its brief in opposition to certiorari, BIO 19-23. Moreover, the Government never argued below that use of an altered check is sufficient evidence to prove intent to defraud a bank; its only defense against petitioner's sufficiency of the evidence claim on appeal was its assertion that it was not required to prove intent to defraud a bank. *See* U.S. C.A. Br. § II.

"owned *by*, or under the custody or control *of*, a financial institution." 18 U.S.C. § 1344(2) (emphasis added). *See, e.g.*, *Blackmon*, 839 F.2d at 904 (finding that a scheme to defraud victims into surrendering foreign currency withdrawn from a bank did not violate Section 1344 because "[a]t the time the foreign currency was obtained, it simply was not in any way under the control or custody of the banks").

Of course, it was possible that Target might subsequently use the checks to attempt to obtain money from a covered financial institution. But it was by no means a foregone conclusion that a bank would eventually be deprived of money as a result. For one thing, Target might detect the crude alterations and never submit the checks to a financial institution (as happened with most of checks in this case). And even if Target had submitted the checks to a bank, the bank itself might detect the alterations and refuse payment.[16] Likewise, in other altered check schemes, a bank might refuse payment because the check was drawn on a closed account,[17] the account had insufficient funds,[18] or the check contained fabricated routing numbers that did not match a real account.[19]

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[16] *See United States v. Barakett*, 994 F.2d 1107, 1109 (5th Cir. 1993).

[17] *See United States v. Goodale*, No. 11-51204, 2013 WL 2631322, at *5 (5th Cir. June 12, 2013) (unpublished).

[18] *See United States v. Orr*, 932 F.2d 330, 331 (4th Cir. 1991).

[19] *Cf. United States v. Brooks*, 394 Fed. Appx. 953, 954 (3d Cir. 2010) (unpublished) (such a scheme charged under a different statute).

More importantly, whether a bank honored the check or not was irrelevant to the accomplishment of the scheme's objective. Once petitioner obtained cash from Target, his objective was achieved, and he was indifferent to whether Target ever submitted the check to a bank or whether a bank ever made payment on it. *See, e.g.*, *Kann v. United States*, 323 U.S. 88, 94 (1944) (finding no mail fraud violation where scheme involved cashing fraudulently obtained checks at a bank, but the bank's use of the mails to collect on the check from the drawee bank was not part of scheme, which "had reached fruition" when the defendants obtained the cash).

The same would be true if the question were analyzed under the text of subsection (1).[20] A scheme to obtain Target's property is not a scheme to "defraud a bank" under any normal understanding of those words. When a fraud statute designates a particular victim, the defendant must intend to obtain property that belongs to that victim (or at least property that is in the victim's custody or control) when the property is obtained. For example, in *Allison Engine Co., Inc. v. United States*, 553 U.S. 662 (2008), the Court construed a provision of the False Claims Act prohibiting conspiracies "to defraud the Government by getting a false or fraudulent claim allowed or paid," 31 U.S.C. § 3729(a)(3). Under this provision, the Court held:

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[20] As discussed, subsection (2) is properly understood as codifying what is already encompassed within subsection (1). But even if the Court thought differently, nothing in either section extends to schemes to obtain property owned by, and under the control or custody of, someone other than a bank.

> [I]t is not enough for a plaintiff to show that the alleged conspirators agreed upon a fraud scheme that had the effect of causing a private entity to make payments using moneys obtained from the Government. Instead, it must be shown that the conspirators intended "to defraud the Government."

553 U.S. at 672. Similarly, in *Tanner v. United States*, 483 U.S. 107 (1987), this Court held that a statute punishing conspiracies "to defraud the United States," 18 U.S.C. § 371, was not violated simply because the defendant had conspired to defraud a private company that, in turn, received federal funding. *Id.* at 110-12, 131-32. Likewise, in this case, it is not enough for the Government to show that Target might ultimately be reimbursed for the money it paid to petitioner with money obtained from a bank.

To be sure, it is possible that a scheme aimed at one victim will have adverse consequences for another. For example, a fraud against a federal funding recipient can indirectly inflict financial injuries on the government. But in part because money is fungible, tracing the secondary financial effects of a theft or fraud from the initial victim outwards is a project with no discernable boundaries. And here, Congress criminalized schemes to defraud a bank itself by obtaining money or property "owned by, or under the control or custody of, a financial institution," 18 U.S.C. § 1344(2), not frauds "in connection with" a bank or "using a bank facility or instrument."

2. There is no reason to contort the bank fraud statute to punish all schemes involving altered checks because Congress criminalized the use of altered checks to defraud merchants and other non-bank victims in an entirely different provision. Section 513 of Title 18, enacted as part of the same bill as the bank fraud provision, provides in relevant part:

> Whoever makes, utters or possesses a counterfeited security . . . of an organization, or whoever makes, utters or possesses a forged security . . . of an organization, with intent to deceive another person, organization, or government shall be fined under this title or imprisoned for not more than ten years, or both.

18 U.S.C. § 513(a).[21] Under the statutory definitions, an altered bank check constitutes a "forged"[22] "security"[23] of a covered "organization."[24]

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[21] Section 513 was enacted as Section 1105(a) of Title II of Pub. L. 98-473, 98 Stat. 1837, 2133. The bank fraud provision was enacted as Section 1108(a) of the same Title. 98 Stat. 1837, 2147.

[22] "Forged" is defined as "a document that purports to be genuine but is not because it has been falsely altered, completed, signed, or endorsed, or contains a false addition thereto or insertion therein, or is a combination of parts of two or more genuine documents." *Id.* § 513(c)(2).

[23] "Security" is defined to include, among other things, a "check, draft, warrant. . . money order, [or] traveler's check." *Id.* § 513(c)(3)(A).

[24] An "organization" is defined to include "a legal entity, other than a government, established or organized for any purpose, and includes a corporation, company, association, firm,

Accordingly, the Government has used Section 513 to charge defendants who used altered checks to defraud merchants, like Target, through similar schemes. *See, e.g.*, *United States v. Brooks*, 394 Fed. Appx. 953, 954 (3d Cir. 2010) (unpublished) (affirming Section 513 conviction of defendant who passed six falsified checks "at Philadelphia area retail stores and fraudulently purchased various merchandise, some of which [he] thereafter returned for cash").

Importantly, the penalties for use of an altered check under Section 513 are far less severe than those imposed for bank fraud under Section 1344. The former calls for a sentence of imprisonment of "not more than ten years." 18 U.S.C. § 513(a). The maximum sentence for bank fraud, on the other hand, is thirty years. *Id.* § 1344. Just as importantly, bank fraud – but not Section 513 – is a predicate offense under the aggravated identity theft Statute, which imposes a mandatory minimum sentence of two years, even on first time offenders. *See* 18 U.S.C. § 1028A(a)(1), (c)(5).

That statutory scheme makes perfect sense if the bank fraud statute is limited to the serious offenses Congress obviously had in mind when it enacted that statute: schemes directed at banks themselves, which risk financial injury to institutions that are often insured by the federal government and have an

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partnership, joint stock company, foundation, institution, society, union, or any other association of persons which operates in or the activities of which affect interstate or foreign commerce." *Id.* § 513(c)(4).

especially important role in the national economy. Congress reasonably concluded that fraudulent check schemes directed at others, including merchants like Target, warrant lesser punishment.

II. The Bank Fraud Statute Does Not Apply To Schemes That Pose No Risk Of Financial Or Other Property Loss To A Covered Financial Institution.

If the Tenth Circuit is correct that Section 1344(2) defines an independent offense that requires no proof of intent to defraud a financial institution, its judgment must still be reversed for an independent reason: the statute cannot reasonably be construed to encompass schemes that pose no risk of financial or other property loss to a bank.

1. In the prototypical bank fraud case, where the defendant intends to deceive a bank in order to obtain the bank's property, the scheme obviously subjects the bank to risk of financial loss, implicating the statute's central purpose of "protecting the financial integrity of these institutions." S. Rep. No. 98-225, at 377. For example, check kiting, loan fraud, and embezzlement by bank employees directly target and endanger a bank's own funds.

In other cases, however, the Government has attempted to charge individuals under Section 1344 even though the defendant targeted a third party, simply because the scheme involved obtaining money from a bank account. *See supra* § I.C (providing examples). For instance, in *United States v. Davis*, 989 F.2d 244 (7th Cir. 1993), the defendant filed a tax return in someone else's name and received a refund check to which he was not entitled. He negotiated the check through a bank, drawing funds from the

U.S. Treasury's account. *Id.* at 246. Because the bank was a holder in due course of a facially valid check, "[t]here is no way in which the fraud could have endangered" the bank's property. *Id.* at 247. Even if the defendant might have deceived the bank into negotiating the check, the scheme was directed at obtaining money from the IRS, not the bank.

As the vast majority of lower courts have rightly perceived, reading the statute to encompass frauds that pose no risk of harm to a bank would expand the statute far beyond its obvious purposes, invade the traditional criminal jurisdiction of the states, and run counter to principles of lenity. *See United States v. Ayewoh*, 627 F.3d 914, 921 (1st Cir. 2010) (holding that the Government must show that the "defendant knowingly . . . exposed a . . . bank to a risk of loss") (omissions in original) (citations and emphasis omitted), *cert. denied*, 132 S. Ct. 141 (2011); *Blackmon*, 839 F.2d at 906 ("Where the victim is not a bank and the fraud does not threaten the financial integrity of a federally controlled or insured bank, there seems no basis in the legislative history for finding coverage under section 1344(a)(2)."); *Thomas*, 315 F.3d at 200 (holding that, however charged, the Government must prove that "harm or loss to the bank [was] contemplated by the wrongdoer to make out a crime of bank fraud"); *United States v. Colton*, 231 F.3d 890, 908 (4th Cir. 2000) (A "financial institution [must] be exposed to 'an actual or potential risk of loss.'" (citation omitted)); *Sprick*, 233 F.3d at 852 (under Section 1344(2), Government "must show not only that the money or assets in the custody or control of a financial institution were obtained by means of fraud but also that doing so placed the financial institution at risk of civil

liability"); *Davis*, 989 F.2d at 246-47 (reversing bank fraud conviction for IRS tax refund scheme because although the defendant "may well have committed fraud against the Internal Revenue Service," there was "no way in which the fraud could have endangered the" bank); *United States v. Staples*, 435 F.3d 860, 867 (8th Cir. 2006) (reversing bank fraud conviction because "there was no loss, or attempt to cause a loss, to a financial institution").[25]

The text of the statute is reasonably read to avoid criminalizing as bank fraud conduct that risks no property loss to a bank. As petitioner has demonstrated, the statute at its core prohibits schemes to "defraud a financial institution," 18 U.S.C. § 1344(1), and this Court has long construed "the words 'to defraud' [to] commonly refer to wrongdoing one in *his* property rights by dishonest methods or schemes." *McNally*, 483 U.S. at 358 (citation omitted) (emphasis added). A scheme to get

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[25] A rigorous application of the intent-to-defraud-a-bank element may make resort to risk of loss analysis unnecessary in many cases. For example, when a bookkeeper issues valid checks to friends who have performed no work for her employer, the defendant should not be seen to have intended to defraud a bank, but rather her employer. *See United States v. Rodriguez*, 140 F.3d 163, 167-68 (2d Cir. 1998). An additional risk of loss analysis is unnecessary. *But see id.* at 168. However, were the Court to accept the court of appeals' conclusion that intent-to-defraud-a-bank is not required in every bank fraud prosecution – or if the Court accepted the Government's assertion (BIO 13) that this requirement is satisfied whenever a defendant uses an altered check, *see supra* § I.D – then the risk-of-loss requirement would stand as the sole remaining constraint on the statute's breadth.

at the funds in a bank customer's account is not a scheme to wrong the bank in *its* property rights unless the bank itself stands to lose some money or other property of its own.

To be sure, subsection (2) refers also to funds that are in the "control or custody" of a financial institution. But given the history and purposes of the statute, the second subsection must be understood as simply an elaboration of the first, not as an attempt to radically expand the statute's scope. *See supra* § I.A.1. Accordingly, the provision is most reasonably read to encompass only those schemes risking the kind of injury addressed by the traditional conception of fraud – that is, schemes that risk an injury to the financial or other property interests of the victim of the fraud (here, the bank). Thus, when the defendant's scheme is not directed at obtaining the bank's own money or property, but is instead directed at money held in a customer account, the Government should be required to prove that the scheme created a risk of injury to the bank's own financial or other property interests.

It may be possible to give the text a more expansive reading. But in similar circumstances, this Court has not hesitated to give federal fraud statutes a narrowing construction to avoid "a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement from Congress." *Cleveland*, 531 U.S. at 24 (narrowly construing scope of property interests covered by mail fraud statute); *see also, e.g., McNally*, 483 U.S. at 360 (same); *Skilling*, 130 S. Ct. at 2928-2933 (construing the honest services fraud amendment to mail fraud statute narrowly to encompass only core applications

clearly intended by Congress). Likewise, in this case, the Court should read the property interests protected by the bank fraud statute as limited to the core interests Congress had in mind, in order to avoid giving the statute the kind of sweep it has long presumed Congress does not intend without making its purpose clear.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed and the case remanded for proceedings consistent with this Court's opinion.

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APPENDIX

APPENDIX A
18 U.S.C. § 1344

BANK FRAUD STATUTE
(current form)

§ 1344. Bank fraud

Whoever knowingly executes, or attempts to execute, a scheme or artifice –

(1) to defraud a financial institution; or

(2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;

shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

APPENDIX B
18 U.S.C. § 20

DEFINITION OF "FINANCIAL INSTITUTION"
(current form)

§ 20. Financial institution defined

As used in this title, the term "financial institution" means –

(1) an insured depository institution (as defined in section 3(c)(2) of the Federal Deposit Insurance Act);

(2) a credit union with accounts insured by the National Credit Union Share Insurance Fund;

(3) a Federal home loan bank or a member, as defined in section 2 of the Federal Home Loan Bank Act (12 U.S.C. 1422), of the Federal home loan bank system;

(4) a System institution of the Farm Credit System, as defined in section 5.35(3) of the Farm Credit Act of 1971;

(5) a small business investment company, as defined in section 103 of the Small Business Investment Act of 1958 (15 U.S.C. 662);

(6) a depository institution holding company (as defined in section 3(w)(1) of the Federal Deposit Insurance Act;

(7) a Federal Reserve bank or a member bank of the Federal Reserve System;

(8) an organization operating under section 25 or section 25(a) of the Federal Reserve Act;

(9) a branch or agency of a foreign bank (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978); or

(10) a mortgage lending business (as defined in section 27 of this title) or any person or entity that makes in whole or in part a federally related mortgage loan as defined in section 3 of the Real Estate Settlement Procedures Act of 1974.

APPENDIX C
18 U.S.C. § 1344 (1988 ed.)

BANK FRAUD STATUTE
(as originally enacted)

§ 1344. Bank fraud

(a) Whoever knowingly executes, or attempts to execute, a scheme or artifice –

(1) to defraud a federally chartered or insured financial institution; or

(2) to obtain any of the moneys, funds, credits, assets, securities or other property owned by or under the custody or control of a federally chartered or insured financial institution by means of false or fraudulent pretenses, representations, or promises, shall be fined not more than $10,000, or imprisoned not more than five years, or both.

(b) As used in this section, the term 'federally chartered or insured financial institution' means —

(1) a bank with deposits insured by the Federal Deposit Insurance Corporation;

(2) an institution with accounts insured by the Federal Savings and Loan Insurance Corporation;

(3) a credit union with accounts insured by the National Credit Union Administration Board;

(4) a Federal home loan bank or a member, as defined in section 2 of the Federal Home Loan Bank Act (12 U.S.C. 1422), of the Federal home loan bank system; or

(5) a bank, banking association, land bank, intermediate credit bank, bank for cooperatives, production credit association, land bank association, mortgage association, trust company, savings bank, or other banking or financial institution organized or operating under the laws of the United States".

APPENDIX D
18 U.S.C. § 1341

MAIL FRAUD STATUTE

(current form)

§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both.

APPENDIX E
Act of June 8, 1872, ch. 335 § 301, 17 Stat. 323

MAIL FRAUD STATUTE
(as originally enacted)

SEC. 301. That if any person having devised or intending to devise any scheme or artifice to defraud, or be effected by either opening or intending to open correspondence or communication with any other person (whether resident within or outside of the United States), by means of the post-office establishment of the United States, or by citing such other person to open communication with the person so devising or intending, shall, in and for executing such scheme or artifice (or attempting so to do), place any letter or packet in any post-office of the United States, or take or receive any therefrom, such person, so misusing the post office establishment, shall be guilty of a misdemeanor, and shall be punished with a fine of not more than five hundred dollars, with or without such imprisonment, as the court shall direct, not exceeding eighteen calendar months. The indictment information, or complaint may severally charge offences to the number of three when committed within the same six calendar months; but the court thereupon shall give a single sentence, and shall proportion the punishment especially to the degree in which the abuse of the post office establishment enters as an instrument into such fraudulent scheme and device.

APPENDIX F
18 U.S.C. § 1341 (1982 ed.)

MAIL FRAUD STATUTE

(as existed at time Bank Fraud statute enacted)

§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

APPENDIX G
18 U.S.C. § 1343

WIRE FRAUD STATUTE
(current form)

§ 1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

APPENDIX H
18 U.S.C. § 513

USE OF COUNTERFEIT OR FORGED SECURITIES TO DEFRAUD

§ 513 Securities of the state and private entities

(a) Whoever makes, utters or possesses a counterfeited security of a State or a political subdivision thereof or of an organization, or whoever makes, utters or possesses a forged security of a State or political subdivision thereof or of an organization, with intent to deceive another person, organization, or government shall be fined under this title or imprisoned for not more than ten years, or both.

* * *

(c) For purposes of this section –

(1) the term "counterfeited" means a document that purports to be genuine but is not, because it has been falsely made or manufactured in its entirety;

(2) the term "forged" means a document that purports to be genuine but is not because it has been falsely altered, completed, signed, or endorsed, or contains a false addition thereto or insertion therein, or is a combination of parts of two or more genuine documents;

(3) the term "security" means –

(A) a note, stock certificate, treasury stock certificate, bond, treasury bond, debenture, certificate of deposit, interest coupon, bill, check, draft, warrant, debit instrument as defined in section 916(c) [2] of

the Electronic Fund Transfer Act, money order, traveler's check, letter of credit, warehouse receipt, negotiable bill of lading, evidence of indebtedness, certificate of interest in or participation in any profit-sharing agreement, collateral-trust certificate, pre-reorganization certificate of subscription, transferable share, investment contract, voting trust certificate, or certificate of interest in tangible or intangible property;

(4) the term "organization" means a legal entity, other than a government, established or organized for any purpose, and includes a corporation, company, association, firm, partnership, joint stock company, foundation, institution, society, union, or any other association of persons which operates in or the activities of which affect interstate or foreign commerce;

APPENDIX I
31 U.S.C. § 3729 (2008 ed.)

FALSE CLAIMS ACT

(As construed in *Allison Engine*)

§ 3729. False claims

(a) Liability for Certain Acts. – Any person who –

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

* * *

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person * * * * .

RESPONDENT'S BRIEF

RECORD
AND
BRIEFS

FEB 25 2014

No. 13-316

In the Supreme Court of the United States

KEVIN LOUGHRIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the government must prove that the defendant intended to defraud a bank and expose it to risk of loss in every prosecution for bank fraud under 18 U.S.C. 1344.

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In the Supreme Court of the United States

No. 13-316

KEVIN LOUGHRIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 710 F.3d 1111.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 2013. A petition for rehearing was denied on June 14, 2013 (Pet. App. 50a). The petition for a writ of certiorari was filed on September 9, 2013, and was granted on December 13, 2013. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are set forth in an appendix to this brief. App., *infra*, 1a-5a.

STATEMENT

Following a jury trial in the United States District Court for the District of Utah, petitioner was convict-

ed of six counts of bank fraud, in violation of 18 U.S.C. 1344; two counts of aggravated identity theft, in violation of 18 U.S.C. 1028A; and one count of possessing stolen mail, in violation of 18 U.S.C. 1708. Pet. App. 23a. The district court sentenced petitioner to 36 months of imprisonment, to be followed by five years of supervised release. *Id.* at 25a-26a. The court of appeals affirmed. *Id.* at 1a-22a. The Bureau of Prisons website indicates that petitioner was released from custody in January 2013.

1. This case concerns the bank-fraud statute, 18 U.S.C. 1344, which Congress enacted to fill "gaps" left in prior legislation. S. Rep. No. 225, 98th Cong., 1st Sess. 377-378 (1983) (*Senate Report*). Before Section 1344, the government used various statutes to prosecute fraudulent schemes targeting funds held by banks. *Ibid.*

Until *United States* v. *Maze*, 414 U.S. 395 (1974), the "most useful" of those statutes was the mail-fraud statute (18 U.S.C. 1341). *Senate Report* 377. The scheme in *Maze* involved the fraudulent use of a stolen bank-issued credit card to purchase goods and services from merchants, which then mailed the sales slips to the card-issuing bank for payment. 414 U.S. at 396-397. The Court explained that the merchants, the bank, and the cardholder were "all * * * victims of [Maze's] scheme," but it determined that the mailings to and from the victim bank were not "for the purpose of executing [the] scheme" as required for a mail-fraud offense. *Id.* at 402, 405 (citation omitted).

Thereafter, the government turned to the false-statement statute, 18 U.S.C. 1014, as "an alternative to * * * the mail fraud [statute]," in order to prosecute a (smaller) set of schemes involving banks, in-

cluding check kiting. *Senate Report* 378. But *Williams* v. *United States*, 458 U.S. 279 (1982), then held that a check is not a "statement" under Section 1014, and *Bell* v. *United States*, 462 U.S. 356 (1983), held that Section 1014 applied to offenses obtaining "property from banks by false pretenses" but only if they involved "a taking and carrying away" of that property. *Senate Report* 378 & n.3.

In 1984, after "a decade long bipartisan effort * * * to make major comprehensive improvements to the Federal criminal laws," Congress enacted a bank-fraud statute that it "modeled" on the mail- and wire-fraud statutes (rather than the false-statement statute) to "reach a wide range of fraudulent activity." *Senate Report* 1, 378; see Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit. II, § 1108(a), 98 Stat. 2147 (enacting Section 1344). As originally enacted, Section 1344 made it an offense to execute, or attempt to execute, certain fraudulent schemes or artifices involving "federally chartered or insured financial institution[s]." 18 U.S.C. 1344(a) (1988).

Congress later defined "financial institution" to include federally insured banks and credit unions, banks within the Federal Reserve System, and other federally significant banking institutions, 18 U.S.C. 20; substituted that new term into Section 1344 without otherwise materially altering Section 1344's definition of the offense; and increased Section 1344's maximum sentence from five to 20, then 30, years of imprisonment. See Crime Control Act of 1990, Pub. L. No. 101-647, §§ 2504(j), 2597(a), 104 Stat. 4861, 4908; Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, §§ 961(k), 962(e), 103 Stat. 500, 503.

Section 1344 as amended defines bank fraud as "knowingly execut[ing], or attempt[ing] to execute, a scheme or artifice—

> (1) to defraud a financial institution; or
>
> (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises.

18 U.S.C. 1344. This case concerns Section 1344's second clause, which prohibits schemes "to obtain" property owned by, or under the custody or control of, a bank, "by means of" false or fraudulent pretenses, representations, or promises.

2. Between October 2009 and his arrest in March 2010, petitioner executed a scheme in Utah in which he stole checks drawn on valid accounts in federally insured financial institutions; altered each check or forged the signature thereon; and used false identification to present the checks to merchants from which petitioner would later obtain cash. Trial Tr. (Tr.) 55, 57, 184-186, 194; Pet. App. 2a, 23a; J.A. 2, 9-10; see Tr. 196-198 (petitioner's confession).[1]

Petitioner executed his scheme by going to private homes dressed as a Mormon missionary and stealing mail from the mailboxes, sometimes with the assistance of his girlfriend, who acted as his lookout. Tr. 53-55. Petitioner stole mail from more than 20 individuals; would sometimes return to the same houses to repeatedly steal mail; and specifically targeted an

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[1] The trial transcript is reproduced at pages 48-260 (Tr. 1-213) and 282-332 (Tr. 214-264) of Volume 4 of the Court of Appeals Appendix.

"older lady" for multiple thefts when she was away from home. Tr. 54, 56. After petitioner extracted bank checks from the stolen mail, he would alter the checks and prepare them for reuse by crossing out or erasing the existing writing or by washing, bleaching, ironing, and drying the checks. Tr. 58; see Tr. 31-32. On at least one occasion, petitioner stole blank convenience checks, completed the payment information, and forged the accountholder's signature. Tr. 44-46.[2]

Petitioner would then pose as the check's lawful maker to use (or attempt to use) the forged or altered check to purchase items at, *inter alia*, Walmart, Kmart, and Target. Tr. 57, 60, 204. A check (also known as a bank draft) is a "written instruction" to the bank on which the check is drawn (the drawee) made by the person signing the check (the drawer) that unconditionally "order[s the bank] to pay a fixed amount of money" to the payee. U.C.C. §§ 3-103(4), (5) and (8), 3-104(a), (e) and (f) (2002). The drawee bank must generally pay the amount that the check orders it to pay—regardless whether the check is "properly payable or not"—unless it dishonors the check before midnight of the next banking day after having received it. *Id.* §§ 4-104(a)(10), 4-302(a)(1); see Tr. 115. If the drawee bank wrongfully dishonors a check ordering it to make payment, however, the bank is liable to its drawer-customer for actual damages, including consequential damages. U.C.C. § 4-402(b).

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[2] A convenience check is a preprinted check, generally linked to a credit card account, provided to a customer that, when used, is processed like a traditional check through the banking system but is ultimately charged against the cardholder's account. See *United States* v. *Otuya*, 720 F.3d 183, 185 (4th Cir. 2013), cert. denied, No. 13-6874 (Feb. 24, 2014).

See also Utah Code Ann. §§ 70A-3-103, 70A-3-104, 70A-4-104, 70A-4-302, 70A-4-402 (2009) (enacting U.C.C. provisions).

Once a merchant accepted petitioner's check ordering a bank to pay the merchant, petitioner would often return the purchased items to the merchant to obtain cash. Tr. 73; see Tr. 159-160, 197-198.

The bank-fraud charges in this case were based on six of the checks that petitioner altered or forged. J.A. 1-2; see Gov't Exh. 1-1, 2-1, 3-1, 4-1, 5-1, 6-1 (the checks). Those checks were drawn on then-valid accounts at six different federally insured financial institutions, some of which were local and others national (Bank of America, Wells Fargo). J.A. 2; Tr. 16, 23, 29, 36, 40-41, 44, 87-89, 175, 233. Between December 31, 2009, and early March 2010, petitioner presented each of the six checks at Target stores. J.A. 1-2; see, *e.g.*, Tr. 92-93, 178, 182. To do so, petitioner altered the first five checks (which had been signed before being stolen) by changing the payment amount and designating Target as the payee. Tr. 15-17, 22-23, 27-30, 34-37, 40-41; Gov't Exh. 1-1, 2-1, 3-1, 4-1, 5-1. Petitioner used the sixth check (which was blank when he stole it) by adding the payment and payee information and forging the accountholder's signature. Tr. 44-46, 178, 182; Gov't Exh. 6-1.

The trial testimony showed that Target deposited three of the six fraudulent checks. Tr. 116 (Check 1); Tr. 28, 101-102 (Check 2); Tr. 175 (Check 5). The evidence further indicated that two of those checks were later paid by the drawee banks, Tr. 28, 101-102, 175, but that the third check was returned by the drawee without payment because the accountholder had promptly directed the bank to refuse payment on

the check after she witnessed a man steal her outgoing mail. Tr. 21, 24, 116 (Check 1).[3] Because Target employees identified the other three checks as fraudulent before Target deposited the checks, those checks were not ultimately presented for payment. Tr. 34, 124, 132-133, 140 (Check 3); Tr. 13-14, 144-145, 172-173 (Check 4); Tr. 178, 186, 189-190, 194 (Check 6).

3. a. After the grand jury indicted petitioner, J.A. 1-4, petitioner elected a jury trial. At the close of the government's case, petitioner orally moved for a Rule 29 judgment of acquittal, which the district court denied. Pet. App. 35a; Tr. 205. The district court noted that the six counts under 18 U.S.C. 1344 appeared to rely on both subsections of that provision: Section 1344(1), which prohibits schemes or artifices to "defraud a financial institution," and Section

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[3] A Target employee testified that the bank honored Check 2, Tr. 101-102, and the accountholder similarly testified that she reported the check to her bank after accessing her checking account online and identifying the cleared check as an abnormal payment, Tr. 28. An employee of the drawee bank later stated that the accountholder had changed her account before Check 2 had been "processed" and, as a result, the check was not honored and was returned to an intermediary bank. Tr. 120-121. That testimony may suggest that the check was initially paid but the drawee later challenged the payment.

A Target employee testified that he examined Check 5 because it looked suspicious but did not indicate whether Target ultimately deposited that check. Tr. 144, 147-148. An employee of Check 5's drawee bank later testified that bank records showed that the bank ultimately paid the check. Tr. 175. Although the accountholder recalled that his neighbor saw someone take his mail and that he immediately canceled his account after receiving a call from a detective later that day, Tr. 42, that testimony is consistent with a bank mistake that resulted in the drawee bank honoring the check and later swallowing the loss.

1344(2), which prohibits schemes or artifices "to obtain any of * * * property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises," 18 U.S.C. 1344. Pet. App. 35a-36a. The court explained that, under Tenth Circuit precedent, Section 1344(1) requires proof that the fraudulent scheme "cause[d] a possible risk [of loss] to the bank," but Section 1344(2) does not. *Id.* at 36a. The court stated its view that the government had not presented evidence of risk of loss and that, as a result, the case could proceed only under Section 1344(2). *Id.* at 36a-37a. The prosecutor stated that, "if" a risk of loss to the bank had "not been shown in the evidence," the case should be submitted to the jury on "the second prong" of Section 1344. *Id.* at 37a.

b. As relevant here, petitioner requested two changes to the jury instructions for bank fraud. Pet. App. 43a-46a. First, petitioner requested that the instruction that the jury must find that he acted with "intent to defraud" be modified by adding "a financial institution" at the end. *Id.* at 43a; cf. J.A. 7. The district court denied the request. Pet. App. 44a-45a.

Second, petitioner alternatively suggested that "if the Court [was] disinclined" to make the first change, the court could, "rather than alter" the intent-to-defraud instruction directly, revise the model instruction defining "intent to defraud." Pet. App. 45a; J.A. 8. Petitioner requested that the phrase "financial loss to another" be changed to "financial loss to a financial institution," Pet. App. 45a, such that the revised instruction would provide: "A defendant acts with the requisite 'intent to defraud' if the defendant acted knowingly and with the specific intent or purpose to

deceive, ordinarily for the purpose of causing some [financial loss to a financial institution] or bringing about some financial gain to the defendant." See J.A. 8. The court denied that request. Pet. App. 45a-46a.

As relevant here, the district court instructed the jury that it could convict petitioner under Section 1344 only if petitioner "knowingly executed or attempted to execute a scheme or artifice to obtain money or property from the particular bank or credit union named in the indictment by means of false or fraudulent pretenses, representations, or promises." J.A. 7. The court explained that the bank or credit union must be a "financial institution" as defined by statute, and that the requirement of a "scheme or artifice to defraud" is satisfied by any design, plan, pattern or course of action intended to deceive others "in order to obtain something of value, such as money, from the institution to be deceived." J.A. 7-8. The court similarly instructed that the requisite "false or fraudulent pretenses, representations, or promises" must be "material," *i.e.*, "they would naturally tend to influence, or were capable of influencing the decision of the particular bank or credit union." *Ibid.*

Finally, the district court instructed that the government must prove petitioner acted with "intent to defraud" and that such intent is established if petitioner "acted knowingly and with the specific intent or purpose to deceive, ordinarily for the purpose of causing some financial loss to another or bringing about some financial gain to the defendant." J.A. 7-8.

c. The jury found petitioner guilty on all counts. Tr. 260-261. Petitioner thereafter renewed his Rule 29 motion for judgment of acquittal. 1 C.A. App. 162-163. The district court denied the motion because it

found "sufficient evidence to support the jury's verdict." *Id.* at 168. Petitioner moved for reconsideration (*id.* at 169-178), arguing that, as relevant here, the evidence was insufficient to prove, as the jury instructions required, that petitioner (1) "executed a scheme to obtain money or property that was in the 'custody and control' of a financial institution," *id.* at 171-175, or (2) "intended to obtain money from a financial institution," *id.* at 176. The district court denied reconsideration. *Id.* at 180.

4. a. On appeal, petitioner argued that the district court erred by refusing to instruct that "a conviction under § 1344(2) requires proof that he intended to defraud the banks on which the checks had been drawn." Pet. App. 3a; see Pet. C.A. Br. 12-30; Pet. C.A. Reply Br. 1-13. Petitioner further argued that the evidence was insufficient to convict him "if an intention to defraud a bank is required." Pet. C.A. Br. 34. But petitioner conceded that, "[i]f [the district court's intent instruction was correct], then there was sufficient evidence to convict." *Ibid.*; see Pet. App. 3a.

b. The court of appeals affirmed. Pet. App. 1a-22a. As relevant here, the court rejected petitioner's argument that "§ 1344(2) require[d] proof that he intended to defraud the banks on which the checks had been drawn." *Id.* at 3a-7a. The court explained that Section 1344(1) and Section 1344(2) define overlapping but "separate offenses." *Id.* at 4a (citation omitted). The court stated that, under its precedent, a conviction under Section 1344(1)—which prohibits schemes "to defraud a financial institution," 18 U.S.C. 1344—requires proof that the defendant "intended to defraud a bank." Pet. App. 4a-5a. But "[u]nlike clause (1)," the court reasoned, "clause (2) does not explicitly

state who must be the object of the scheme" and Section 1344(2)'s text does not require that the fraud be "intentionally directed at a bank." *Id.* at 5a.

The court of appeals accordingly held that Section 1344(2) requires "an intent to defraud *someone*" and that "an individual can violate § 1344(2) by obtaining money from a bank while intending to defraud someone else." Pet. App. 5a-6a. The court noted that its "interpretation of § 1344(2) may cast a wide net for bank fraud liability" but concluded that its interpretation was dictated by the statutory text and its precedent. *Id.* at 7a.

SUMMARY OF ARGUMENT

The court of appeals correctly affirmed petitioner's convictions.

1. Section 1344's text, structure, and drafting history demonstrate that Congress adopted broad text for Section 1344(2) prohibiting schemes in which (a) the defendant *intends* to "obtain" bank property and (b) false or fraudulent "means" are employed, regardless whether the defendant *intends* to defraud the bank itself.

a. Congress enacted Section 1344 with two distinct clauses carrying different meanings. Clause (1) prohibits schemes "to defraud a financial institution." 18 U.S.C. 1344(1). It therefore requires an intent to "defraud" a bank.

Clause (2) has significantly different language and structure. It applies to "any" property "owned by, or under the custody or control of," a bank, thus protecting a range of property interests common in banking contexts. Clause (2) requires intent to "obtain" any such property, just as Clause (1) requires intent to "defraud" the bank. Yet Congress separately speci-

fied that a scheme under Clause (2) is one involving false or fraudulent "means," thus making clear that falsehood or fraud is merely a method of *pursuing* the intended *goal* of obtaining bank property.

Reading Section 1344(2) to incorporate the intent expressly specified in Clause (1) would erroneously ignore Congress's use of different language in the two provisions. And restricting Section 1344(2) just to defendants who *intend* "to defraud a financial institution" would be anomalous because Clause (2) also covers bank-owned property under the custody or control of non-banking entities.

b. Petitioner contends that Clause (2) merely covers what is already encompassed within Clause (1), thus effectively reading "or" as "including." No sense of "or" carries that meaning. Section 1344's structure also shows that its two clauses are independent: They bear numbering of equal, not subordinate, rank; are separated by line breaks; and display equal indentation. The statute's origins likewise demonstrate that Congress modeled the provision on the mail- and wire-fraud statutes to incorporate existing judicial interpretations, which, at the time, uniformly held that their use of the disjunctive "or" gave independent meaning to the clauses separated thereby.

Petitioner argues that this Court's 1987 interpretation of the mail-fraud statute in *McNally* v. *United States*, 483 U.S. 350 (1987), read the statute's second clause as an illustration of the first. Section 1344 was enacted in 1984 and Congress's intent cannot properly be judged by subsequent events. *McNally*, moreover, had powerful reasons to conclude Congress intended the non-textual use of "or" in the mail-fraud statute. For Section 1344, all indications point the other way.

c. Petitioner argues that Section 1344's purpose supports an intent-to-defraud-the-bank requirement. But Congress enacted Section 1344 in the wake of *United States* v. *Maze*, 414 U.S. 395 (1974), to restore authority to prosecute frauds involving banks. *Maze* overturned a mail-fraud conviction in which the Court acknowledged the bank was victimized by the fraudulent use of a bank card to acquire goods and services from victimized merchants, regardless which victim ultimately bore the financial loss. Congress responded with a broadly worded bank-fraud statute to cover at least similar schemes, including petitioner's, where banks are the indirect victims of deceit directly targeted at others.

Principles of lenity and federalism concerns do not aid petitioner. Lenity is only a tie-breaking concept for grievously ambiguous statutes, and petitioner offers no plausible reading for an intent-to-defraud-a-bank requirement. Federalism concerns likewise would not warrant imposing petitioner's bank-focused intent requirement.

d. The text of Section 1344(2) could be read broadly to apply to contexts in which a defendant intends to defraud a third party and obtains money from a bank as part of the scheme, even if his false or fraudulent efforts have no potential to reach the bank or affect its disposition of its property. Congress might have concluded that it was appropriate to broadly address such financial crimes through federal law. But an alternative reading of Section 1344(2) to cover only schemes that in some way target a bank still would not establish a requirement of *intent* to defraud a bank. The statute might appropriately be read to reach schemes in which false or fraudulent statements would foresee-

ably or inherently be directed at the bank and have the potential to influence its actions. That understanding of the "means" for executing the scheme would accord with the statute's expressed purpose and avoid federalizing frauds only tangentially related to the banking system without limiting its reach (as petitioner suggests) to frauds that are directly *intended* to victimize a bank. Petitioner, however, would not benefit from such a reading, because the jury instructions were adequate under that interpretation.

e. Petitioner waived his sufficiency-of-the-evidence contentions, which lie outside the question presented. In any event, the evidence was sufficient to convict petitioner on the jury instructions here.

2. Petitioner argues that Section 1344(2) should reach only schemes actually posing a risk of loss to a bank. That is a different question than the question presented, which concerns *intent* to expose a bank to risk of loss. Petitioner does not appear to make that intent-based argument. Nor is actual risk of loss a tenable reading. The gravamen of bank fraud is the scheme itself, not a completed fraud that might pose a risk of loss.

Petitioner's risk-of-loss requirement has no basis in the statutory text. In fact, Congress rejected text that would have targeted schemes to inflict such "economic loss." Nor does a risk-of-loss requirement make sense: It would hinge criminal liability on abstruse provisions of the Uniform Commercial Code unsuited for the task, draw nonsensical distinctions between equally culpable conduct, and lead to arbitrary results.

ARGUMENT

SECTION 1344(2) DOES NOT REQUIRE PROOF OF INTENT TO DEFRAUD A BANK OR PROOF THAT THE FRAUDULENT SCHEME POSED A RISK OF FINANCIAL OR PROPERTY LOSS TO THE BANK

Congress has made it unlawful knowingly to execute or attempt to execute a scheme or artifice either "(1) to defraud a financial institution," or "(2) to obtain any of the * * * property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. 1344. Petitioner's scheme satisfied the second clause of Section 1344. Petitioner used checks that, with his fraudulent modifications, ordered each drawee bank to pay specified sums and, because petitioner fraudulently tendered those checks to Target as valid checks, the jury could reasonably find that a reasonably foreseeable or inherent part of his scheme was that each check would be presented to banks for payment as he ordered. Indeed, the jury concluded beyond a reasonable doubt that petitioner's scheme sought "to obtain money or property from [each] bank"; each bank was a "financial institution"; petitioner's scheme involved a plan "intended to deceive others in order to obtain something of value * * * from the institution to be deceived" in his scheme; and his fraudulent representations "naturally tend[ed] to influence, or were capable of influencing[,] the decision of [each] bank." J.A. 7-8.

Petitioner contends that the court of appeals erred in affirming his conviction because Section 1344(2) requires "intent to defraud a bank," Pet. Br. 13-36, and proof of a "risk of financial or other property loss to a bank," *id.* at 36-40. Neither contention can be

squared with Section 1344's text, structure, or drafting history. Section 1344 contains an explicit "intent to defraud a bank" requirement in Clause (1) but no such requirement can be imported into Clause (2). And a "risk of loss" requirement is nowhere in the statute's text and is inconsistent with its history.

Imposing such requirements would be at odds with the statute's purpose. Congress altered prior law in order to protect banks against the use of false or fraudulent statements to obtain bank-held funds. In Clause (2), it avoided any requirement that juries determine whether a particular defendant *intended* that his false or fraudulent statements would victimize a bank. And nothing in the statute requires proof that, under local commercial law, the bank would face possible financial loss.

The statute's broad language makes it possible to read it as prohibiting false statements that are designed to obtain bank funds from a bank customer, even when no false information is conveyed to the bank capable of influencing its action as a foreseeable or inherent component of the scheme. Alternatively, it may be appropriate to limit the statute's reach to cases in which the scheme foreseeably or inherently directs false statements to the bank that may influence its disposition of funds. But that interpretation would not assist petitioner: *His* scheme involved fraudulent checks that would naturally be submitted to a bank for payment, and the jury instructions permitted conviction on that basis. Under either reading, the district court correctly declined to give petitioner's intent-to-defraud-a-bank and risk-of-loss instructions, which might exonerate even persons who use false or fraudulent financial instruments that will be

used in the ordinary course to obtain money from banks.

A. Section 1344(2) Does Not Require Proof That The Defendant Intended To Defraud A Bank

1. The statutory text and structure show that Section 1344(2) requires proof of intent to obtain bank property but not intent to defraud the bank itself

Section 1344 makes it unlawful to execute a fraudulent scheme that falls into at least one of two overlapping but independent categories: Clause (1) of Section 1344 describes schemes "to defraud a financial institution," 18 U.S.C. 1344(1), whereas Clause (2) describes schemes to obtain property either owned by the bank or property owned by others in the bank's custody or control, by means of false or fraudulent pretenses. The text of those provisions is materially different, describing different types of schemes with different intent requirements. Section 1344(2), unlike Section 1344(1), does not require proof that the defendant "intended to defraud a bank."[4]

Section 1344 defines a bank-fraud offense as "knowingly execut[ing], or attempt[ing] to execute, a scheme or artifice—

(1) to defraud a financial institution; or

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[4] The relevant question in this case, as petitioner notes (Br. 14 n.5), is whether there are two distinct means of proving bank fraud under 18 U.S.C. 1344, not whether the statute contains two offenses for purposes of the Double Jeopardy Clause or multiplicity analysis. In the latter context, courts widely agree that the unit of prosecution for bank-fraud offenses is each execution or attempted execution of the fraudulent scheme. See *United States* v. *Hickman*, 331 F.3d 429, 446 (5th Cir. 2003) (collecting cases).

> (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises.

18 U.S.C. 1344. Congress modeled Section 1344 "on the mail and wire fraud statutes" in Sections 1341 and 1343. *Neder* v. *United States*, 527 U.S. 1, 20-21 (1999). The provisions thus share certain traits. The introductory text of all three demonstrates that the "gravamen of [each] offense is the scheme" itself, *Bridge* v. *Phoenix Bond & Indem. Co.*, 553 U.S. 639, 647 (2008), "rather than [a] completed fraud," *Neder*, 527 U.S. at 24-25. Concepts such as "reliance and damage" that are integral to a common-law action for fraud thus "have no place" in a Section 1344 prosecution. *Ibid.*

After Section 1344's introductory language, however, Congress made several material modifications to text drawn from the mail- and wire-fraud statutes in order to tailor the language to the banking context. Those changes are reflected in Section 1344's two categories of proscribed schemes that Congress described in two numbered clauses.

a. The first clause of Section 1344, which describes a scheme "to defraud a financial institution," requires that the defendant *intend* "to defraud a [bank]" because it textually specifies that goal as the purpose of the scheme. In the mail-fraud context, this Court has concluded that "the words 'to defraud'" incorporate their familiar common-law sense and thus "refer 'to wronging one in his property rights by dishonest methods or schemes.'" *McNally* v. *United States*, 483 U.S. 350, 358 (1987) (citation omitted). That conclusion applies directly to Section 1344(1).

Petitioner asserts (Br. 23) that it is widely acknowledged that Section 1344(1) requires not just deceit generally but "inten[t] to deceive a bank" in order to obtain its property. Schemes to deceive banks directly are common in this context and, in cases in which the defendant's intent to deceive a bank had already been established, some courts of appeals have stated that Section 1344(1) requires such intent. See *United States* v. *Brandon*, 298 F.3d 307, 311 (4th Cir. 2002); *United States* v. *Kenrick*, 221 F.3d 19, 29 (1st Cir.) (en banc), cert. denied, 531 U.S. 961, and 531 U.S. 1042 (2000) (addressing Section 1344(2)); *United States* v. *Stavroulakis*, 952 F.2d 686, 694 (2d Cir.), cert. denied, 504 U.S. 926 (1992). For present purposes, the government assumes *arguendo* that a scheme to "defraud a financial institution" under Section 1344(1) requires proof of intent to obtain bank property *and* proof of intent to deceive the same bank. That assumption makes no difference here, where petitioner's conviction rests on Section 1344(2).[5]

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[5] While fraudulent schemes frequently involve attempts to deceive the owner of the targeted property, the deceit need not necessarily involve deceiving the owner. In the context of the mail- and wire-fraud statutes, the courts of appeals, including the same court that decided *Kenrick*, have nearly unanimously held that a scheme to deprive a person of property by deceiving someone else can qualify as mail or wire fraud. See *United States* v. *Seidling*, 737 F.3d 1155, 1161 & n.2 (7th Cir. 2013) (citing cases); see also, *e.g.*, *United States* v. *McMillan*, 600 F.3d 434, 449 (5th Cir.), cert. denied, 131 S. Ct. 504 (2010); *United States* v. *Christopher*, 142 F.3d 46, 54 (1st Cir.), cert. denied, 525 U.S. 1054 (1998); *United States* v. *Blumeyer*, 114 F.3d 758, 767-768 (8th Cir.), cert. denied, 522 U.S. 938 and 522 U.S. 1008 (1997). But see *United States* v. *Lew*, 875 F.2d 219, 221 (9th Cir. 1989) (stating that defendant must intend to "obtain money or property from the one who is deceived").

b. Section 1344(2) is structurally separated from 1344(1) and employs significantly different language. In contrast to Clause (1)'s prohibition of schemes to defraud a bank, Clause (2) specifically addresses schemes that have the goal of obtaining property owned by, or in the custody of, a bank by means of misrepresentation. In that context, Congress required proof of the defendant's intent to obtain the property specified but did not require proof that the defendant intend to defraud a bank.

Whereas Section 1344(1) expressly focuses on schemes "to defraud a financial institution," Section 1344(2)'s text focuses on schemes that target a range of property interests common in banking contexts. For example, the relationship between a bank and a customer with a deposit account is ordinarily one of debtor to creditor. 5A *Michie on Banks and Banking* § 1, at 1-2 (2003). That relationship is subject to state law and contract principles but, as a general matter, when a bank customer deposits funds into a general account, "title to the money is immediately vested in, and becomes the property of, the bank," *id.* § 38, at 7 (Supp. 2013), which then becomes indebted to the customer in the amount of the deposit and repays that debt by, for instance, "honoring checks drawn against the deposits," *id.* § 1, at 8-18 (2003). In other contexts involving "special deposit[s]," however, the customer will retain title while the bank takes custody of the deposit, serving as the customer's principal or bailee. 5B *id.* § 337, at 465-470 (1991); see *Marine Bank* v. *Fulton Bank*, 69 U.S. (2 Wall.) 252, 256 (1865) (discussing deposits). As a result, a bank normally will hold title to deposits and occasionally (in special contexts) will have possession of deposits owned by the

depositors. A bank, of course, may also own property from non-deposit sources. And like any legal entity that may own property, a bank may choose to place that property into the custody or control of others for investment or other purposes.

Section 1344(2) specifically addresses those forms of bank-related property by making it unnecessary to determine precisely which property interest is at stake. Consistent with Congress's desire to prohibit "a wide range of fraudulent activity" involving banks, *Senate Report* 378, Section 1344's second clause applies to "any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution." 18 U.S.C. 1344(2). The "word 'any' has an expansive meaning" that extends the provision to "'whatever kind'" of property specified. *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) (citation omitted). The "property" targeted by a fraudulent scheme, for instance, need not be "owned by" a bank. Because Section 1344(2) provides that the property can be "owned by, *or* under the custody or control of" a bank, it covers property owned by a non-bank entity (like a customer with a special deposit account) so long as it is within the bank's "custody or control." Likewise, because Section 1344(2) covers all property "owned by" a bank, it protects bank-owned property that a bank has entrusted to the custody or control of others.

Section 1344(2) then prohibits schemes "to obtain" the property. "Obtain" read naturally means to "gain or attain [either] possession or disposal of" something. *Webster's Third New International Dictionary* 1559 (1976) (*Webster's*). Section 1344(2) thus applies when an individual either (a) schemes to gain possession of

the property himself or (b) schemes to attain "disposal" of the property by gaining "the power or authority to dispose of" it, *i.e.*, "to transfer [it] into new hands or to the control of someone else." *Id.* at 654 (defining "disposal" and "dispose of"); see *United States* v. *Green*, 350 U.S. 415, 417, 420 (1956) (holding that a person "obtains" property by extortion in violation of 18 U.S.C. 1951(b)(2) by securing a payment that is made to another; explaining that the extortionist need not acquire any "direct benefit" to "obtain[] the property"). Schemes to obtain property by orchestrating its direct transfer to another are thus covered by Section 1344(2). Any other rule would leave a significant hole in the statute and facilitate circumvention.

Finally, Section 1344(2) requires that the scheme's method to obtain bank property must be "false or fraudulent." The phrase "by means of" in Section 1344(2) specifies that the property must be obtained "by the use of" a false or fraudulent method through which the "desired end is attained or made more likely." *Webster's* 1398-1399 (defining "by means of" and "mean"). In other words, Section 1344(2) prohibits a scheme if the scheme's "desired end"—obtaining bank-owned or bank-controlled property—is to be achieved with "false or fraudulent pretenses, representations, or promises." Those "'false or fraudulent pretenses, representations, or promises,'" in turn, must involve "material[] * * * falsehood[s]" to fall within the statute. *Neder*, 527 U.S. at 21, 25 (quoting 18 U.S.C. 1344(2)).

c. By specifying that the "scheme" must be "to obtain" property owned by, or under the custody or control of, a bank, Section 1344(2) requires proof of *intent* to acquire that property. The word "to" in this

context is "used as a function word to indicate purpose" or "intention." *Webster*'s 2401 (definition 2a). Congress thus defined the type of scheme encompassed by Clause (2) as one "for the purpose of" (*ibid.*) attaining or disposing of bank property.

Unlike Section 1344(1), nothing in the text of Section 1344(2) suggests that a defendant must also *intend* "to defraud a financial institution." Section 1344(2) provides that the scheme must use "false or fraudulent pretenses, representations, or promises" as the "means" of *pursuing* its goal of obtaining bank-related property. Section 1344(2) thus recognizes that deception can be used to obtain bank-held funds even if the scheme is not immediately aimed at the bank, and even if the object of the scheme is funds over which it has custody rather than ownership. That broader coverage makes it unimportant to determine whether a schemer who passes fraudulent checks to a merchant also specifically intends to defraud a bank; it is enough that an inherent part of his scheme involves obtaining the bank's property through deception (*i.e.*, the fraudulent check).

Restricting Section 1344(2) to defendants who *intend* "to defraud a financial institution" would be particularly anomalous given the broad categories of property expressly protected under Section 1344(2). A scheme to obtain bank-owned property that the bank has entrusted to the custody or control of others, for instance, could presumably be committed by deceiving the property's custodians, not the bank. Yet under petitioner's reading, such schemes to obtain property owned by the bank can never fall within Section 1344(2), notwithstanding its broad text, be-

cause (petitioner contends) all schemes under Section 1344(2) must be intended to directly deceive the bank.

Limiting Section 1344(2) to schemes directly aimed "to defraud a financial institution" would also disregard Congress's careful drafting of the provision. And it would do so in a particularly pernicious way because Congress, after adopting that very language specifying that intent requirement in Clause (1), adopted entirely different language for Clause (2). Where, as here, "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (citation omitted). No sound basis exists for overriding that presumption. Indeed, petitioner's view (Br. 15) that Section 1344(2) "simply clarif[ies] and codif[ies] what is already encompassed within the first clause" runs afoul of yet another "cardinal principle of statutory construction," namely, that courts "must 'give effect, if possible, to every clause and word of a statute.'" *Williams* v. *Taylor*, 529 U.S. 362, 404 (2000) (citation omitted).

The text of Section 1344(2) could be broadly read to apply to circumstances in which a defendant "intend[s] to defraud [a third party]" and "obtain[s] money from a bank" as part of the scheme, Pet. App. 5a-6a, even if the false or fraudulent pretenses, representations, or promises he uses have no potential to be conveyed to the bank or affect its disposition of the money. Although such frauds may be tangential to the banking system, Congress might have concluded that it was appropriate to broadly address such financial crimes through federal law or that capturing such

conduct would avoid disputes (like that in this case) about whether fraudulent conduct that can affect bank property was sufficiently directed at the bank to trigger the statute's protection. But regardless whether other aspects of Section 1344(2) might be read to constrain the statutes' reach (see pp. 40-44, *infra*), nothing in the statute's text or structure warrants requiring proof of intent to defraud a bank.

2. Section 1344 uses the word "or" in its normal disjunctive sense

Petitioner recognizes (Br. 15) that it is "natural" to interpret the two numbered clauses in Section 1344, which are separated by the disjunctive term "or," as separate provisions that should each be given independent meaning according to their own terms. But petitioner contends (Br. 8) that, "despite appearances," the second clause in Section 1344 merely specifies what "is already encompassed by the first." Br. 15-23. Nothing in the text supports petitioner's position.

a. The conjunction "or" is "almost always" used to express the "disjunctive," such that "the words it connects are to 'be given separate meanings.'" *United States* v. *Woods*, 134 S. Ct. 557, 567 (2013) (quoting *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979)). Congress plainly intended to express that meaning in Section 1344, because no other meaning of "or" will fit the text.

"Or" can in some limited contexts be used to "introduce an appositive—a word or phrase that is synonymous with what precedes it" (*e.g.*, "Batman or the Caped Crusader"), *Woods*, 134 S. Ct. at 567—and "or" may similarly be used when the phrase that immediately follows it provides a "correction or greater exactness of phrasing or meaning" that then limits the

preceding language (*e.g.*, the "king had no children—[or] no legitimate children"). *Webster's* 1585 (definitions 1(3) and (4)). But petitioner does not contend that the detailed text in Section 1344(2) is synonymous with "to defraud a financial institution"; nor does he argue that Section 1344(2) narrows Section 1344(1). He instead asserts that Section 1344(2) describes "what is already *encompassed* within the first clause" of Section 1344. Br. 15 (emphasis added). Petitioner thus contends Congress intended "or" to mean "including," but that view is textually untenable. No sense of the word "or" means "including."

The structure that Congress adopted for Section 1344 reinforces that linguistic conclusion. Congress numbered the provision's two clauses "(1)" and "(2)"; inserted a line break before, between, and after them; and gave each clause the same indentation, thus placing them visually on equal footing. Legislatures that intend a statutory clause to be a subset of an immediately preceding provision designated as "(1)" will enact a subordinate identifier for the clause—*e.g.*, "(a)"—not an identifier of equal rank like "(2)." Moreover, Congress's use of line breaks and indentation would not make sense if the text in Section 1344(2) were merely an illustration of the language in Section 1344(1). It is difficult to imagine legislative drafting that more clearly expresses Congress's intent that Clauses (1) and (2) be interpreted independently.

Section 1344's origins point to the same conclusion. When Congress drafted the text that became Section 1344, it expressly "modeled [the provision] on the [then-]present wire and mail fraud statutes which ha[d] been construed by the courts to reach a wide range of fraudulent activity." *Senate Report* 378. At

that time, "each of the Courts of Appeals that ha[d] addressed" the issue had concluded that the mail-fraud statute's first two clauses joined by "or" must be read "in the disjunctive" and "construed independently." *McNally*, 483 U.S. at 358; see *id.* at 365 & n.5 (Stevens, J., dissenting); *Skilling* v. *United States*, 130 S. Ct. 2896, 2926 (2010). Because "Congress modeled [Section 1344] after [the mail- and wire-fraud statutes]" and "passed [Section 1344] with the explicit understanding that it would be interpreted as [those earlier provisions]," Congress is presumed to have been aware "[a]t the time of [Section 1344's] enactment" of the then-existing uniform appellate precedent interpreting those predecessors and "intended [Section 1344] to be interpreted similarly." *Fitzgerald* v. *Barnstable Sch. Comm.*, 555 U.S. 246, 258-259 (2009) (construing statute to follow then-extant court of appeals precedents); see *Franklin* v. *Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 71 (1992) ("[W]e evaluate the state of the law when the Legislature passed [the statute]" to "determin[e] Congress' intent."); *Lorillard* v. *Pons*, 434 U.S. 575, 581 (1978).

The drafting history of Section 1344 also reflects that Congress rejected narrower language. After the Senate passed the Comprehensive Crime Control Act bill (S. 1762, 98th Cong.) containing the text ultimately enacted as Section 1344, see 130 Cong. Rec. 1587, 1636-1637 (1984); *Senate Report* 377-379, 772, a House subcommittee hearing addressed the relevant portions of S. 1762 and a competing House measure (H.R. 5405). *Financial Bribery and Fraud: Hearing Before the Subcomm. on Crim. Justice of the House Comm. on the Judiciary*, 98th Cong., 2d Sess. (1984) (*House Hearing*). The House bill was narrower than its Sen-

ate counterpart, defining a Section 1344 offense as knowingly "devis[ing] a plan to obtain the property of a national credit institution, or to cause economic loss to such an institution by fraudulent means." *Id.* at 19. The Justice Department "strongly urge[d]" the subcommittee "to follow the format in * * * S. 1762" because, the Department explained, Section 1344 should be given "broader coverage" and the Senate text was "modeled on the present mail and wire fraud statutes deliberately to incorporate [the] existing case law," which did not limit the offenses to schemes "to obtain money or inflict an economic loss." *Id.* at 4, 12. The House bill was later reported as a clean bill (H.R. 5872) with revisions to "address[] some of the Justice Department's concerns" by adopting S. 1762's two-clause structure with language "intended to incorporate case law" giving "expansive interpretations" to the mail- and wire-fraud statutes. H.R. Rep. No. 901, 98th Cong., 2d Sess. 3-4 (1984). The House passed that bill. 130 Cong. Rec. at 21,493.

The House version of Section 1344, however, remained narrower than the Senate measure because it did not include text targeting schemes to obtain non-bank-owned property "under the custody or control" of a bank. See 130 Cong. Rec. at 21,492. Proponents of the Senate's broader approach thus inserted the Senate-passed text of S. 1762 (introduced as H.R. 5963) into pending legislation (H.R. J. Res. 648) that the House passed. *Id.* at 26,780-26,781, 26,834-26,838; see *id.* at 26,727-26,728. After the Senate concurred with amendments not relevant here, H.R. Conf. Rep. No. 1159, 98th Cong., 2d Sess. 415-419 (1984), Section 1344 was enacted into law. Comprehensive Crime

Control Act of 1984, Pub. L. No. 98-473, Tit. II, § 1108(a), 98 Stat. 2147.

The drafting history thus further demonstrates that Congress was cognizant of the appellate decisions broadly construing the mail-fraud statute because of its disjunctive "or"[6] and enacted a broadly worded provision modeled on that statute "to reach a wide range of fraudulent activity." *Senate Report* 378.

b. Petitioner primarily rests (Br. 15-20) his argument on the view that Section 1344 should be construed like the mail-fraud statute (18 U.S.C. 1341), which contains text similar to Section 1344, including two similarly worded initial clauses separated by the word "or." Three years *after* Congress enacted Section 1344, this Court in *McNally* effectively treated the "or" in the mail-fraud statute as meaning "including" because the Court construed the second clause of the mail-fraud statute as merely codifying an 1872 decision that construed the first. Petitioner contends (Br. 17-19) that *McNally*'s 1987 result should be extended to Section 1344. That chronologically challenged theory is unsound. Congress should not be expected to predict future events. And although *McNally* adopted a non-textual application of "or" for the mail-fraud statute, which *Cleveland* v. *United States*, 531 U.S. 12, 26 (2000), later reaffirmed, the Court did so because it found powerful indications that the Congress that enacted the relevant mail-fraud text in-

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[6] See, *e.g.*, *United States* v. *Frankel*, 721 F.2d 917, 920 (3d Cir. 1983) (citing decisions adopting this "disjunctive reading"); *United States* v. *Scott*, 701 F.2d 1340, 1343 (11th Cir.), cert. denied, 464 U.S. 856 (1983); *United States* v. *Castor*, 558 F.2d 379, 382-383 (7th Cir. 1977), cert. denied, 434 U.S. 1010 (1978).

tended that result. For Section 1344, all indications point the other way.

The Court in *McNally* held that the mail-fraud statute, 18 U.S.C. 1341, as it then existed, did not reach schemes to "defraud citizens of their intangible rights to honest [services]" and, instead, was "limited in scope to the protection of property rights." 483 U.S. at 355, 360. In reaching that conclusion, the Court noted that the phrases "to defraud" and "for obtaining money or property by means of false or fraudulent pretenses, representations, or promises" in Section 1341 arguably should be "construed independently" because they are separated by "or." *Id.* at 358. But the Court concluded that the statute's drafting history showed that the 1909 addition of the second phrase was intended merely to codify the holding in *Durland* v. *United States*, 161 U.S. 306 (1896), which itself construed the statute's text prohibiting "any scheme or artifice to defraud." 483 U.S. at 356-358.

The 1909 version of the mail-fraud statute that added the mail-fraud statute's second clause was enacted in the Criminal Code of 1909, which comprehensively "codif[ied], revise[d], and amend[ed]" federal criminal laws in a single Act, repealing the then-existing mail-fraud statute (Rev. Stat. § 5480) and other laws and reenacting their provisions within the new Code. Act of Mar. 4, 1909, ch. 321, §§ 1, 215, 341, 35 Stat. 1088, 1130, 1153. When Congress "revis[es] and consolidat[es] the laws" in such codification statutes, textual changes to revised provisions are generally presumed not "to change their policy, unless such intention be clearly expressed." *Fulman* v. *United States*, 434 U.S. 528, 538 (1978) (quoting *United States*

v. *Ryder*, 110 U.S. 729, 740 (1884)); see *United States* v. *Williams*, 341 U.S. 70, 79 (1951) (plurality opinion) (1909 Criminal Code's changes to a provision did not make "any change in substance"). The statutory context thus reversed the normal presumption that new text should be given a distinctive meaning and strongly indicated that the mail-fraud statute's second clause was merely a recodification describing the earlier prohibition without change.

The Court in *McNally* had more than the codification statute; it identified evidence confirming that Congress intended no substantive change. The new language added by the 1909 codification was suggested by a congressional report citing *Durland* as the source of the recodified text. *McNally*, 483 U.S. at 357 n.7. Moreover, the new statutory text was drawn directly from language in *Durland*. *Id.* at 358. Those factors provided powerful reasons to conclude that the 1909 recodification of the mail-fraud statute—notwithstanding its use of "or"—added statutory text that simply reflected *Durland*'s interpretation of the preexisting prohibition on "schemes or artifices 'to defraud'" and, thus, should not be "construed independently." See *id.* at 358-359.

The Court later reaffirmed *McNally*'s "reading of § 1341" in *Cleveland* for another "compelling" reason: statutory *stare decisis*. *Cleveland*, 531 U.S. at 26 (citing *Hilton* v. *South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 205 (1991)).

None of those reasons justifies a non-textual reading of "or" in Section 1344. Section 1344 was not enacted as part of a recodification and no legislative history indicates that the provision's second clause—which includes significant new text that did not origi-

nate in a judicial opinion—was intended to reflect an interpretation of the first. In fact, all indications point the other way. Congress enacted Section 1344 when the mail-fraud statute's "or" was uniformly understood to compel a disjunctive reading; drafted the provision to rely on existing appellate precedent; adopted new language to tailor Section 1344 for the banking context; and ultimately structured Section 1344 with numbered clauses, line breaks, and indentation quite distinct from the block text still used by the mail- and wire-fraud statutes, all of which demonstrate Congress's intent that Section 1344's clauses be construed independently. In short, no basis exists for departing from the disjunctive meaning of "or" compelled by Section 1344's text.

3. Petitioner fails to provide any textual justification for his intent-to-defraud-a-bank requirement

Petitioner argues (Br. 23-25) that, even if Section 1344's two clauses are given independent meanings, the Court should still read Clause (1)'s requirement of an intent to defraud a bank into Clause (2) because, in his view, that requirement "easily map[s] onto the [latter's] plain language" and accords with Clause (1)'s "traditional" conception of bank fraud. Br. 23. Petitioner is incorrect.

Section 1344(1)'s intent requirement does not "easily map" (Br. 23) onto Section 1344(2). Petitioner fails to account for key textual differences between the two subsections. Most prominently, Section 1344(2)'s text distinguishes between the schemer's intent (to obtain bank property) and his false or fraudulent means to achieve that goal; extends to property for which the bank has no ownership interest; and covers bank-owned property held by non-bank custodians

for which an intent-to-deceive-the-bank requirement makes little sense. See pp. 21-24, *supra*.

Petitioner contends (Br. 24) that Section 1344's title—"Bank fraud"—"strongly impl[ies]" an intent-to-defraud-a-bank requirement. But "[t]he title of a statute . . . cannot limit the plain meaning of the text," *Pennsylvania Dep't of Corr.* v. *Yeskey*, 52 4 U.S. 206, 212 (1998) (citation omitted), and the label "bank fraud" no more implies an intent to defraud a bank than the label "mail fraud" implies an intent to defraud the mail. Both modern, short-hand labels merely reflect that the offenses concern banks and the mail.

Petitioner suggests (Br. 24-25) that Congress would have drafted Section 1344 differently if it had intended to cover frauds where a bank is a mere instrumentality of the offense (in the sense that bank funds available to a customer are targeted, but the customer, not the bank, is the object of the fraud). But Congress drafted Section 1344(2) to cover a wide range of situations to protect bank-held property as well as bank-owned property against deceptive schemes, whether or not aimed directly at the bank. A narrow focus on defrauding the bank would not have achieved that purpose, if, as petitioner argues here, his fraudulent-check scheme would fall outside Section 1344(2) because he aimed to defraud only the merchants to whom he negotiated the forged and altered checks and not the banks that would later receive, process, and potentially pay those forged and altered checks. And, as discussed, petitioner has offered no plausible textual reading to support his intent-to-deceive-the-bank requirement.

4. Neither Section 1344's purpose nor principles of lenity and federalism warrant importing an intent-to-defraud-a-bank requirement into Section 1344(2)

Petitioner further contends (Br. 25-36) that Section 1344(2) should be construed to require intent to defraud a bank because that reading best accords with congressional purpose and is compelled by the rule of lenity and federalism principles. None of those arguments supports his effort to collapse Section 1344's two distinct subsections into one single scheme-to-defraud-a-bank prohibition.

a. Petitioner contends (Br. 25-27) that Section 1344's legislative history reflects Congress's intent that Section 1344 protect banks from "frauds in which the victims are financial institutions" and that the government has a strong interest in "protecting the financial integrity" of banks. Br. 26 (quoting *Senate Report* 377). Such statements provide no reason to negate the distinct sweep of Section 1344(2).

"The best evidence of th[e] purpose [of a statute] is the statutory text adopted by both Houses of Congress and submitted to the President." *West Va. Univ. Hosps., Inc.* v. *Casey*, 499 U.S. 83, 98 (1991). Consequently, "[t]he operation of a law enacted by Congress need not be seconded by a committee report on pain of judicial nullification." *Riegel* v. *Medtronic, Inc.*, 552 U.S. 312, 326 (2008). Even when legislative history is consulted, "'[o]nly the most extraordinary showing of contrary intentions' in [that] history will justify a departure from [statutory] language." *Salinas* v. *United States*, 522 U.S. 52, 57 (1997) (citation omitted). Thus, in contexts where the relevant history does not expressly discuss the application of a provision in certain contexts, "the fact that a statute can be

'applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'" *Yeskey*, 524 U.S. at 212; see *Moskal* v. *United States*, 498 U.S. 103, 111 (1990) ("This Court has never required that every permissible application of a statute be expressly referred to in its legislative history.").

Section 1344(2) cannot properly be treated as redundant of Section 1344(1) simply because Congress identified banks as "victims" of frauds and expressed an interest in banks' financial integrity. Congress enacted Section 1344 in response to this Court's mail-fraud decision in *United States* v. *Maze*, 414 U.S. 395, 396-397 (1974), in which the Court confronted a fraudulent scheme (similar to that in this case) in which Maze stole a credit card and used it by forging the cardholder's signature to make purchases at various merchants. See *Senate Report* 377-378; see also pp. 2-3, *supra*. The Court concluded in *Maze* that the merchants, the bank that issued the card, and the cardowner were "all * * * victims of [the fraudulent] scheme," regardless "which of [the] victims ultimately bore the loss," but concluded that the mailing element of the offense was not satisfied by post-purchase mailings directed toward "adjusting accounts between * * * th[ose] victims." *Id.* at 402. The Senate Report presumably had *Maze*'s understanding of banks as "victims" in mind when explaining that Section 1344 was intended to fill the gap left by *Maze*. And because Congress enacted Section 1344 to restore authority curtailed by *Maze*, if Congress had intended Section 1344 not to reach schemes similar to that in *Maze*, it presumably would have adopted textual limitations to curtail its scope rather than enacting broad

text intended to "reach a wide range of fraudulent activity." *Senate Report* 378.[7]

Nor does the federal interest in "protecting the financial integrity" of banks warrant petitioner's position. As an initial matter, Congress rejected text that would have limited Section 1344 to frauds that deprived banks of their own property or caused them "economic loss." See pp. 27-28, *supra*. And schemes involving the use of false or fraudulent instruments that will ordinarily be submitted to banks for payment to obtain bank-held funds can threaten the financial integrity of banks, even if not as directly as frauds that are squarely and intentionally aimed at banks. Indeed, in 2010, banks lost approximately $900 million from check fraud and $950 million from debit-card fraud directed at deposit accounts and spent an additional $10 billion for check-fraud-prevention strategies. American Bankers Ass'n, *2011 Deposit Account Fraud Survey Report* 7 (2011). Those bank losses were attributed to counterfeit checks (30%), forgeries (29%), alterations (6%), kiting (1%), deposited items

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[7] Until *Maze*, the mail-fraud statute had been the government's "most useful" tool for combating bank fraud, because "the collection procedures of victim banks ordinarily entailed use of the mails." *Senate Report* 377. After *Maze*, the government turned to the false-statement statute, 18 U.S.C. 1014, to combat a narrower category of conduct, including check kiting. *Senate Report* 378. This Court subsequently held that a check is not a "statement" under Section 1014 and that Section 1014 applies to offenses obtaining "property from banks by false pretenses" only if they involve "a taking and carrying away" of that property. See p. 3, *supra*. Thereafter, Congress enacted Section 1344 "modeled" on the mail- and wire-fraud statutes (not Section 1014) to restore the prior authority to prosecute a "wide range" of frauds involving banks. *Senate Report* 378.

later returned by other banks (33%), and other fraud. *Id.* at 20-21, 23-24. That year, the banking industry estimates that there were 626,000 instances of check fraud. *Id.* at 17. Congress's choice to enact a broadly worded provision to "assure a basis for Federal prosecution of those who victimize [federally insured or organized] banks through fraudulent schemes," *Senate Report* 377, should not be revised by inserting petitioner's intent-to-defraud-the-bank requirement.

b. Petitioner's reliance (Br. 27-29) on the rule of lenity and federalism principles likewise provides no sound basis for reading an intent-to-defraud-the-bank requirement into Section 1344(2).

The rule of lenity is a tie-breaking rule of statutory construction that applies only if, "at the end of the process of construing what Congress has expressed," *Callanan* v. *United States*, 364 U.S. 587, 596 (1961), "there is a grievous ambiguity or uncertainty in the statute," *Muscarello* v. *United States*, 524 U.S. 125, 139 (1998) (internal quotation marks and citations omitted). Neither "[t]he mere possibility of articulating a narrower construction," *Smith* v. *United States*, 508 U.S. 223, 239 (1993), nor the "existence of some statutory ambiguity" is "sufficient to warrant application of th[e] rule," *Muscarello*, 524 U.S. at 138. Instead, the rule of lenity applies "only if, after seizing everything from which aid can be derived, . . . [the Court] can make no more than a guess as to what Congress intended." *Ibid.* (internal quotation marks and citations omitted). "Lenity applies only when the equipoise of competing reasons cannot otherwise be resolved." *Johnson* v. *United States*, 529 U.S. 694, 713 n.13 (2000).

No such equipoise exists here. While lenity is a tool that may apply when choosing between equally plausible textual interpretations, petitioner has never proffered a plausible textual reading for his position.

Petitioner's resort (Br. 29) to federalism principles provides him no shelter. Although this Court normally does not interpret statutes "to have significantly changed the federal-state balance" unless Congress clearly conveys its desire to effect such a change, *Cleveland*, 531 U.S. at 25 (citation and internal quotation marks omitted), that principle does not apply, where, as here, Congress has enacted a broad statute that is textually "unambiguous" on the disputed question. *Salinas*, 522 U.S. at 60. Petitioner's invocation of federalism, moreover, is somewhat perplexing because he concedes (Br. 10, 30) that cashing a fraudulent personal check at a bank will constitute bank fraud. It is not apparent why Congress would believe that an otherwise local check-fraud offense would warrant federal prosecution when done at a bank, but not when the offense involves presentation of a fraudulent bank check to a merchant in interstate commerce, which will present the check to its own bank. Cf. 18 U.S.C. 2(b) ("Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.")

Petitioner (Br. 27-28) cites decisions from 1988 to 2002 to support his view that Section 1344(2) has "enormous breadth" without an intent-to-defraud-the-bank requirement. But those decisions illustrate that schemes in which the bank presence is truly attenuated may fall outside Section 1344's scope for other reasons. *E.g.*, *United States* v. *Blackmon*, 839 F.2d

900, 904 (2d Cir. 1988) (foreign currency obtained via "pigeon drop" scheme was not "under the custody or control" of the bank); see *United States* v. *Nkansah*, 699 F.3d 743, 755 n.1 (2d Cir. 2012) (Lynch, J., concurring) (discussing *Blackmon*). And if the Court were to construe Section 1344(2) to require that the fraudulent means of obtaining bank-held property must have a natural tendency to influence the bank (*e.g.*, by reaching the bank) as a foreseeable or inherent consequence of the scheme, see pp. 40-44, *infra* (discussing this construction), it would further alleviate concerns about the statute's breadth. No appropriate construction, however, would justify an intent-to-defraud-a-bank requirement drawn from text in Section 1344(1) that Congress did not enact in Section 1344(2).

To the extent that petitioner advocates an interpretation of Section 1344 that would not reach other schemes that *do* involve deception directed at a bank, his position undermines the very function that Congress enacted the provision to serve. Excluding schemes involving deception directed at a bank would incorrectly constrict Section 1344(2) and dishonor Congress's response to this Court's mail-fraud decision in *Maze* by enacting a statute "to provide an effective vehicle for the prosecution of frauds in which the victims are financial institutions." *Senate Report* 377.

5. A requirement that the means selected to execute the scheme must involve false or fraudulent representations that would foreseeably or inherently be directed to the bank would alleviate concerns about Section 1344(2)'s breadth without imposing an intent-to-defraud-the-bank requirement

Petitioner suggests (Br. 24) that the scheme under Section 1344(2) must in some way target a bank, rather than "someone who happens to have a bank account," but that suggestion does not establish that, as petitioner contends, Section 1344(2) requires *intent* to defraud a bank. Any such targeting requirement that could be read into Section 1344(2) would still reach schemes, like petitioner's, involving the fraudulent use of forged or altered checks that have the natural tendency of deceiving a bank with respect to funds it owns or has in its custody.

Petitioner is correct (Br. 24) that a scheme described in Section 1344(2) must be to obtain property owned by, or under the custody or control of, a bank. He is also correct (*ibid.*) that "the provision does not say expressly to whom the false representations must be directed." Congress's failure to specify to whom such deceit will be directed could be understood as a decision to prohibit any fraudulent schemes to obtain bank property, even if no false or fraudulent representations are conveyed to a bank. That, however, is not necessarily the only interpretation of the text, when read in context. The statute might appropriately be read to reach schemes in which false or fraudulent statements would foreseeably or inherently be directed to the bank and have the potential to influence its actions. Such a reading of the "means" required by Section 1344 would accord with the statute's

purpose, and avoid federalizing frauds that are only tangentially related to the banking system, without artificially limiting the statute's coverage (as petitioner would do) to frauds that are directly *intended* to victimize the bank.

When Congress enacted Section 1344, it was well aware that many fraudulent financial instruments flow through the banking system because they are submitted by customers who are themselves victimized and who submit the instruments in the normal course to banks for payment. That was the precise scenario in *Maze*, and one purpose of Section 1344 was to overcome the limitations in the mail-fraud statute that (after *Maze*) precluded prosecution in such instances. See pp. 2-3, 35-36 & n.7, *supra*. Congress thus modeled Section 1344 on the mail-fraud (and wire-fraud) statutes after having concluded that the mail-fraud statute had been the "most useful" tool for combating bank fraud before *Maze*, "because the collection procedures of victim banks" had enabled prosecution. See *Senate Report* 377-378.

A possible interpretation of Section 1344's gap-filling function, therefore, would permit prosecution when the defendant's scheme would foreseeably or inherently direct false or fraudulent statements to a bank, and would naturally influence it with respect to property in its custody. That understanding of the "means" required by Section 1344(2) to obtain bank property would exclude fraudulent schemes against bank customers that did not naturally entail the customers' passing the false or fraudulent representations to the bank in a fashion that would influence the bank's actions. It also would be consonant with Congress's intent to "provide an effective vehicle for the

prosecution of frauds in which the victims are financial institutions." *Senate Report* 377.

But such an interpretation, if adopted, would not justify limiting Section 1344(2) to schemes *directly* targeting a bank with false or fraudulent statements. Such a restriction would unduly undermine Congress's restoration of authority lost after *Maze*. Accordingly, to the extent that the "by means of" requirement in 18 U.S.C. 1344(2) were read to require some connection between the false or fraudulent representations and the obtaining of funds beyond mere causation, it would not entail only fraud that involved direct dealings with the bank. It would also cover cases, such as *Maze* and this case, in which forged or falsified instruments would naturally be submitted to a bank for payment after having been submitted to someone else. See *Nkansah*, 699 F.3d at 754 (Lynch, J., concurring).

Here, an inherent part of petitioner's scheme was the use of forged or altered instruments that, if undetected (as petitioner no doubt hoped), would be submitted to banks for payment. See *Brandon*, 298 F.3d at 313 (concluding that "[a]n inherent part of [a similar check] scheme" was that checks would be injected "into the stream of commerce" and "presented to the drawee banks"); *United States* v. *Morganfield*, 501 F.3d 453, 466 (5th Cir. 2007) (concluding that "an inherent consequence of the [defendant's] scheme" was that "bad checks would be presented to the bank by the merchants who accepted the[m]"), cert. denied, 553 U.S. 1067 (2008); *United States* v. *Crisci*, 273 F.3d 235, 240 (2d Cir. 2001) ("inherent in [the defendant's] transactions with [check-cashing business] was the risk that the forged checks would be presented to a

bank for payment"). That the initial target of the fraud was a merchant did not prevent the scheme from targeting other financial actors in the banking system as a natural aspect of the scheme. And the longer the downstream holders of the altered checks remained deceived, the greater the possibility of petitioner continuing and repeating his scheme.

b. Petitioner argues (Br. 34-35) that Congress could not have intended Section 1344(2) to reach schemes involving forged or altered checks tendered to merchants, which would then be submitted to banks, because when Congress enacted Section 1344, it also enacted a statute prohibiting the use of altered securities (including checks) of a State or an "organization" with "intent to deceive" another person. 18 U.S.C. 513(a), (c)(2), (3)(A) and (4). Assuming that Section 513 applies to forged checks of individuals drawn on banking organizations, each statute nevertheless serves a distinct purpose. Section 513 protects "the integrity of writings" by prohibiting the deceptive use of counterfeit and forged securities; it does not serve as a general fraud statute. See S. Rep. No. 307, 97th Cong., 1st Sess. 773 & n.40 (1981); cf. *United States* v. *Hunt*, 456 F.3d 1255, 1268 (10th Cir. 2006) (explaining that the "1981 Senate report" provides "the authoritative legislative history of § 513").[8] By contrast, the "gravamen of the offense" in Section 1344 is not the particular acts contemplated by the

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[8] Departing from other counterfeiting and forgery statutes enacted at the same time, Section 513 requires "intent to deceive" rather than "intent to defraud." S. Rep. No. 307, at 773 ("[I]t is not necessary that the intent be to deprive another person or a government of property or some other tangible right."); see *United States* v. *Blood*, 435 F.3d 612, 619-620 (6th Cir. 2006).

scheme but "the scheme" itself, see *Bridge*, 553 U.S. at 647—a scheme that must seek to defraud a bank or to obtain property either owned by a bank or under its custody or control. "It is not unusual for a particular act to violate more than one criminal statute, and in such situations the Government may proceed under any statute that applies." *United States* v. *Aguilar*, 515 U.S. 593, 616 (1995) (Scalia, J., concurring in part and dissenting in part) (internal citations omitted); see *United States* v. *Beacon Brass Co.*, 344 U.S. 43, 45-46 (1952).

c. The jury instructions in this case are adequate to sustain petitioner's conviction under this theory. The jury was instructed that a bank-fraud conviction would require "a design, plan, pattern or course of action * * * to obtain something of value, such as money, from the *institution to be deceived*" and that the scheme's "false or fraudulent pretenses, representations, or promises" must "naturally tend to influence, or were capable of influencing[,] the *decision of the particular bank.*" J.A. 7-8 (emphasis added); cf. Tr. 249. Those instructions fairly conveyed that the methods used in petitioner's scheme had to have the natural tendency of "deceiv[ing]" the financial institution with false or fraudulent statements in a way that influences the bank's actions in connection with its property.

6. Petitioner waived his evidentiary sufficiency argument, which lies outside the question presented and is without merit

Because Section 1344(2) does not require intent to defraud a financial institution, the court of appeals correctly affirmed the district court's rejection of petitioner's requested jury instruction. See Pet. App.

5a-6a. Petitioner nevertheless appears to argue (Br. 30-32) that the evidence was insufficient for a reason having nothing to do with that instruction. Petitioner affirmatively waived that evidentiary contention, which lies outside the question presented and, in any event, is incorrect.

a. Petitioner suggests that the evidence was insufficient to prove that his fraudulent scheme was aimed at obtaining "property owned by, or under the custody or control of," a bank, 18 U.S.C. 1344(2), because, he contends, his scheme was completed once he obtained cash from Target, regardless whether banks later honored his checks. Br. 30-32 (citing *Kann* v. *United States*, 323 U.S. 88 (1944)). Although petitioner made this argument to the jury (Tr. 233-235) and district court (p. 10, *supra*), he waived it on appeal by conceding that, "[i]f the [district court's] intent[] to defraud" instruction was correct, "then there was sufficient evidence to convict." Pet. C.A. Br. 34. In light of that express waiver, petitioner's evidentiary challenge to the scope of the scheme is foreclosed. *United States* v. *Olano*, 507 U.S. 725, 732-733 (1993) ("Deviation from a legal rule is [not] 'error'" if "the rule has been waived.").

Petitioner argued on appeal that the evidence was insufficient "*if* an intention to defraud a bank is required." Pet. C.A. Br. 34 (emphasis added). The court of appeals thus did not pass on that contention because it rejected its premise. See Pet. App. 3a (noting that sufficiency argument was premised on existence of instructional error). Petitioner accordingly limited his certiorari petition to challenge the jury instructions and did not seek review on any sufficiency-of-the-evidence question. Pet. i. Petitioner thus again

waived his fact-bound evidentiary contention in this Court, because it is not "fairly included" in the question he presented. See Sup. Ct. R. 14.1(a); *Wood* v. *Allen*, 558 U.S. 290, 304 (2010) (questions are "not fairly included" in the question presented simply because they are "*related*" and "perhaps *complementary* to" that question) (quoting *Yee* v. *Escondido*, 503 U.S. 519, 537 (1992)).

b. In any event, petitioner's contention lacks merit. For petitioner's scheme to work, Target had to accept his fraudulent checks as payment for merchandise. A merchant, of course, will only accept a check on the understanding that it can obtain funds from a bank by depositing the check, which then "would eventually be presented to the drawee bank[]." *Brandon*, 298 F.3d at 313. A bank check is itself an unconditional order to the drawee bank to pay the amount specified. See p. 5, *supra*. Petitioner's scheme was thus built on the fact that his orders to make payment would be presented to the drawee banks "in the ordinary course of business," *Periera* v. *United States*, 347 U.S. 1, 8-9 (1954). See pp. 42-43, *supra* (injection of fraudulent checks into stream of commerce is an inherent aspect of check-fraud schemes); cf. *Cramer* v. *United States*, 325 U.S. 1, 31 (1945) (jury may infer that defendant "intend[ed] the natural consequences * * * reasonably expect[ed] to result from his acts"). The jury could also reasonably infer that the scheme involved an attempt to pass fraudulent checks that would not be detected (or at least would delay detection) in order to forestall the possible involvement of law-enforcement.

Moreover, petitioner did not engage in an isolated transaction. Petitioner repeatedly stole mail from

some of the same individuals and repeatedly tendered fraudulent checks to the same merchants from (at least) October 2009 to March 2010. See pp. 4-6, *supra*. If the drawee bank pays a fraudulent check deposited by a deceived merchant, the odds of detecting petitioner as the fraudster decrease. The jury could thus reasonably infer that the scheme thus sought to provide checks that would evade detection and result in payment by a bank. Even in the mail-fraud context, a jury may reasonably find that a mailing that occurs after the schemer's "receipt of the goods [directly] obtained by the fraud" was part of the scheme when it would "postpone [the merchants'] ultimate complaint to the authorities" and thus "make the apprehension of the defendant[] less likely." *United States* v. *Lane*, 474 U.S. 438, 451-452 (1986) (quoting *Maze*, 414 U.S. at 403). A rational jury thus have could convicted petitioner on the trial evidence.

B. Section 1344(2) Does Not Require Proof That The Fraudulent Scheme Actually Posed A Risk Of Financial Or Other Property Loss To The Bank

Petitioner further argues (Br. 36-40) that the Court should limit Section 1344 to "schemes that pose [a] risk of financial or other property loss to a bank," even if "no proof of intent to defraud a financial institution" is required. Br. 36. Petitioner thus appears to argue a different question than the Question Presented, which asks whether Section 1344 always requires proof that "the defendant *intended to* defraud a bank and *expose it to risk of loss*." Pet. i (emphases added). That question does not ask whether the "scheme," in fact, poses that risk.

Petitioner may have elected not to address the question presented because requiring an intent to

expose the bank to a risk of loss makes little sense where, as here, the schemer must already intend "to obtain * * * property owned by, or under the custody or control of, a [bank]," 18 U.S.C. 1344(2). It is hard to imagine why Congress would have wanted such an intent requirement, and petitioner does not now appear to argue that such intent is necessary.[9]

Petitioner thus argues (Br. 36) that Section 1344(2) proscribes a scheme to obtain bank property only if it, in fact, "pose[s] [a] risk of financial or other property loss to a bank." But it is well established that the "gravamen of the offense is the scheme" itself, *Bridge*, 553 U.S. at 647, "rather than [a] completed fraud," *Neder*, 527 U.S. at 25 (construing Section 1344). All a defendant must do to violate Section 1344 is knowingly "attempt[]" to execute the "scheme" specified by the statute. 18 U.S.C. 1344. Section 1344 thus does not require "damage" or actual "reliance" on any false or fraudulent pretense, representation, or promise. *Neder*, 527 U.S. at 25. Unless Congress intended to ensure that the most incompetent of fraudsters who earnestly attempt to obtain bank property but are so inept that they create no "risk of loss" fall *outside*

---

[9] Petitioner makes no effort to rely on common-law fraud for good reason. Even if Congress had intended to borrow from common law, the intent element of common-law fraud entails only the "intention to induce the plaintiff to act or refrain from action in reliance upon the misrepresentation." W. Page Keeton et al., *Prosser and Keeton on Torts* § 105, at 728 (5th ed. 1984); see Restatement (Second) of Torts § 525 (1976) ("One who fraudulently makes a representation * * * for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit."); *Kenrick*, 221 F.3d at 28 ("[C]ommon-law fraud has no additional 'intent to harm' requirement.").

Section 1344's prohibitions, while those with better planned schemes violate the statute, petitioner's submission must be incorrect.

1. A risk-of-loss requirement has no basis in the text or history of Section 1344

a. Nothing in Section 1344(2)'s text suggests a risk-of-loss requirement. Section 1344(2) "facially requires only that the perpetrator engage in a 'scheme or artifice' in order to obtain bank funds or funds in bank custody." *United States* v. *Thomas*, 315 F.3d 190, 196 (3d Cir. 2002); see *United States* v. *McNeil*, 320 F.3d 1034, 1037 (9th Cir.), cert. denied, 540 U.S. 842 (2003). Indeed, the provision appears "carefully worded" to "*avoid* imposing [a risk-of-loss] requirement" and related "technical issues about whether the money that a fraudster obtained actually *belonged* to the bank, or whether the bank itself would suffer a financial loss." *Nkansah*, 699 F.3d at 754 (Lynch, J., concurring). This Court "ordinarily resist[s] reading words * * * into a statute that do not appear on its face," *Bates* v. *United States*, 522 U.S. 23, 29 (1997), and petitioner provides no reason to do so.

Petitioner makes little effort to ground his a risk-of-loss requirement in Section 1344's text for good reason: That requirement "has been from the start a judicial construct, not expressed in or even suggested by the statutory language." *Nkansah*, 699 F.3d at 755 (Lynch, J., concurring). Although petitioner relies (Br. 38-39) on the term "defraud" in Clause (1) of Section 1344 to conclude that that provision addresses plans to "wrong the bank in its property rights," petitioner ignores the fact that the gravamen of the offense is the scheme, not any results of the scheme. See p. 48, *supra*.

Petitioner's attempt to extend his logic to Clause (2) runs further afield. He argues (Br. 39) that Section 1344(2) "must be understood simply as an elaboration of [Section 1344(1)]," but, as explained, that conclusion cannot be reconciled with the disjunctive statute Congress enacted. See pp. 25-32, *supra*. Moreover, petitioner appears to misunderstand the nature of bank deposits in asserting (Br. 39) that "the Government should be required to prove that the scheme created a risk of injury to the bank's own financial or other property interests" if the scheme is "directed at money held in a customer account." Most bank accounts, including personal checking accounts, are general accounts. The bank thus honors a check with its *own* money, not the customer's money. See p. 20, *supra*.

Petitioner suggests (Br. 39) that the Court may adopt his atextual "narrowing construction" by citing *Cleveland*, *McNally*, and *Skilling*. But in those cases the Court interpreted the relevant text in light of the normal understanding of "property," *Cleveland*, 531 U.S. at 20-24; the statutory context showing Congress's codification of a decision of this Court, see pp. 29-31, *supra* (discussing *McNally*); and lower-court decisions that Congress codified in an effort to overturn the result in *McNally*, see *Skilling*, 130 S. Ct. at 2928-2931. None of those decisions justifies imposing a "risk of loss" test that has no foundation in the statute's text, history, or purpose.

b. Section 1344's drafting history demonstrates that Congress did not intend a risk-of-loss requirement. Congress specifically considered and rejected language for Section 1344 that would have limited its application to schemes to obtain a bank's property or to cause "economic loss" to a bank. *House Hearing* 19

(reproducing H.R. 5405). After the Department of Justice objected that Section 1344's application should be "broader" than schemes to "inflict an economic loss" on a bank, *id.* at 4, Congress eliminated the economic-loss provision and adopted broader text in Section 1344. See pp. 27-28, *supra*. Petitioner's risk-of-financial-loss requirement would unjustifiably rewrite Section 1344 by incorporating a modification of language that Congress rejected.

2. Petitioner's risk-of-loss element is unsound

Petitioner ultimately suggests (Br. 38-40 & n.25) that a risk-of-loss element is needed to "constrai[n]" the scope of Section 1344. Even ignoring the textual problems with his position, a risk-of-loss requirement would be poorly suited to that role. The requirement would make criminal liability hinge on abstruse provisions of the Uniform Commercial Code (U.C.C.) and would lead to "entirely arbitrary" "distinction[s] between those [who] are and those [who] are not subject to prosecution," *Nkansah*, 699 F.3d at 761 (Lynch, J., concurring).

a. Requiring the government to prove that a fraudulent scheme placed a bank at risk of loss would require courts—and juries—to determine whether the bank would suffer a loss or be subject to civil liability if the scheme were successful. That, in turn, would require consideration of state commercial law unsuited for this context.

The rules for determining the bank's liability for a fraudulent check after the bank has honored it are set forth in the U.C.C., as incorporated into state law. See *J. Walter Thompson, U.S.A., Inc.* v. *First Bank-Americano*, 518 F.3d 128, 131 n.2 (2d Cir. 2008) (cited at Br. 4). A leading treatise describes the material in

its chapter on "Basic Liability Arising from Stolen Instruments and Forged Signatures" as "abstract, difficult,[] interrelated," and "'for adults only.'" 2 James J. White et al., *Uniform Commercial Code* § 19:1, at 311, 318 (6th ed. 2013). The authors explain that the bank on which a check is drawn generally "is not entitled to charge the drawer's account when it pays over a forged drawer's signature or over a forged indorsement or when it pays an altered instrument (except to the extent of its original tenor)." *Id.* at 313. But they immediately note that "there are exceptions to these rules" and that "[t]heft, forgery, and alteration of negotiable instruments have generated thousands of litigated cases." *Ibid.* Another treatise has multiple chapters discussing the liability rules for check kiting, check fraud via forged and counterfeit checks, check fraud by alteration, and check fraud through forged indorsements. 1-2 Barkley Clark & Barbara Clark, *The Law of Bank Deposits, Collection and Credit Cards*, Chs. 9-12 (rev. ed. 2013). Most of the detailed rules governing the check payment system are thus understandably foreign to "anyone but a small cadre of bankers, banking lawyers, and law professors who teach courses in negotiable instruments." *Nkansah*, 699 F.3d at 760 (Lynch, J., concurring).

These complexities would make it difficult to administer a risk-of-loss requirement in principled fashion. A single federal appellate precedent construing a particular State's commercial law is unlikely to set the boundaries for bank-fraud liability, even for categories of cases involving similar schemes (such as check fraud). Compare *United States* v. *Odiodio*, 244 F.3d 398, 402 (5th Cir. 2001) (finding evidence of risk-of-

loss was insufficient under Texas law in case involving stolen check), with *Morganfield*, 501 F.3d at 466 n.52 (distinguishing *Odiodio* in check-cashing-scheme prosecution; noting that "*Odiodio*'s description of Texas law is not exhaustive" because it "does not, for instance, consider protections for holders in due course, the final payment rule, or the circumstances when presenting a forged instrument may not violate presentment warranties") (citations omitted). The need to elaborate the applicable (and potentially State-by-State dependent) U.C.C. principles over time underscores "the obvious difficulty of making [criminal] liability for federal bank fraud turn on the correct application of state commercial law and possible subsequent state-court adjudication." *McNeil*, 320 F.3d at 1038. That difficulty extends beyond just the U.C.C. Petitioner's submission would create uncertainty more generally about what must be shown to establish "risk of loss" (*e.g.*, *de minimis* risk, civil liability, or something else).

b. Petitioner relies (Br. 36) on *United States* v. *Davis*, 989 F.2d 245 (7th Cir. 1993), but *Davis* itself reveals serious flaws in the risk-of-loss requirement.

The *Davis* defendants filed a false tax return in the name of a homeless man; obtained a refund check for more than $12,000; tricked the homeless man into endorsing the check and signing a signature card for a bank account they fraudulently opened; and withdrew cash from the bank after depositing the IRS check. 989 F.2d at 246. As Judge Lynch later explained about a similar scheme, the text of Section 1344(2) fits *Davis* "like the proverbial glove": The fraudster "devised *a scheme to obtain money* from the banks at which the accounts were opened by making *false rep-*

resentations to them, and obtained cash that had been in the banks' hands." *Nkansah*, 699 F.3d at 754 (Lynch, J., concurring). But *Davis* reversed the bank-fraud conviction after concluding that the bank was not "endangered" by the scheme, because it qualified under the U.C.C. as "a holder in due course of the IRS' check" and thus "took free of any defenses that the IRS might have had to a suit by the payee [the homeless man] or other holders." 989 F.2d at 246.

Other courts have concluded that banks can "suffer various reputational or other indirect harms that will satisfy [the risk-of-loss] element even if they are a holder in due course." *Nkansah*, 699 F.3d at 750 n.3. And even if "the bank is not legally liable," the Second Circuit has noted that banks "will often swallow the loss for the customer" resulting from a forged check. *Stavroulakis*, 952 F.2d at 695. That may well be the logical choice not only to preserve customer satisfaction but also because of the potential transaction costs of seeking to recover a payment after the bank has honored a check. The indeterminate character of petitioner's risk-of-loss requirement is itself reflected in *Davis*, which suggested that the conviction could have been affirmed *if* the government had established that one of the exceptions to the U.C.C.'s holder-in-due-course rules had applied. 989 F.2d at 247. Criminal liability should not turn on such vagaries.

c. Moreover, even if the liability rules governing certain transactions were sufficiently clear, a risk-of-loss requirement would lead to arbitrary results in prosecutions. This case, for instance, implicates different U.C.C. rules governing (1) alterations to checks and (2) forged signatures on checks. As petitioner notes (Br. 4), a bank that presents an *altered* check to

the drawee bank for payment normally bears the loss, which may then be recovered from the merchant that accepted the check. *J. Walter Thompson*, 518 F.3d at 131 n.2. The drawee bank, by contrast, is normally liable for paying a check over its customer's *forged* signature. *Ibid.*; see *Wachovia Bank, N.A.* v. *Foster Bancshares, Inc.*, 457 F.3d 619, 622 (7th Cir. 2006). Liability—and hence risk of loss—thus can turn on whether a fraudulent check was altered or forged, a fact that is not always obvious from the face of the check. See *ibid.* And a single case can involve multiple kinds of check fraud. Petitioner, for instance, altered Checks 1-5 and forged the signature on Check 6. See p. 6, *supra*. Resting criminal liability under Section 1344(2) on such distinctions "makes no sense." *Nkansah*, 699 F.3d at 762 (Lynch, J., concurring).[10]

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[10] For the reasons explained in the brief in opposition (at 10-12), petitioner waived and forfeited any risk-of-loss argument. See also Pet. C.A. Br. 16 (conceding that instruction on "risk of civil liability or financial loss" was unnecessary). Even if petitioner had not waived the argument, it should be reviewed only for plain error.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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STATUTORY APPENDIX

1. 18 U.S.C. 20 provides:

Financial institution defined

As used in this title, the term "financial institution" means—

(1) an insured depository institution (as defined in section 3(c)(2) of the Federal Deposit Insurance Act);

(2) a credit union with accounts insured by the National Credit Union Share Insurance Fund;

(3) a Federal home loan bank or a member, as defined in section 2 of the Federal Home Loan Bank Act (12 U.S.C. 1422), of the Federal home loan bank system;

(4) a System institution of the Farm Credit System, as defined in section 5.35(3) of the Farm Credit Act of 1971;

(5) a small business investment company, as defined in section 103 of the Small Business Investment Act of 1958 (15 U.S.C. 662);

(6) a depository institution holding company as (defined[1] in section 3(w)(1) of the Federal Deposit Insurance Act;

(7) a Federal Reserve bank or a member bank of the Federal Reserve System;

---

[1] Per original.

(8) an organization operating under section 25 or section 25(a) of the Federal Reserve Act;

(9) a branch or agency of a foreign bank (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978); or

(10) a mortgage lending business (as defined in section 27 of this title) or any person or entity that makes in whole or in part a federally related mortgage loan as defined in section 3 of the Real Estate Settlement Procedures Act of 1974.

2. 18 U.S.C. 1341 provides:

Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or

such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

3. 18 U.S.C. 1343 provides:

Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T.

Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

4. 18 U.S.C. 1344 (1988) provided:

Bank fraud

(a) Whoever knowingly executes, or attempts to execute, a scheme or artifice—

(1) to defraud a federally chartered or insured financial institution; or

(2) to obtain any of the moneys, funds, credits, assets, securities or other property owned by or under the custody or control of a federally chartered or insured financial institution by means of false or fraudulent pretenses, representations, or promises,

shall be fined not more than $10,000, or imprisoned not more than five years, or both.

(b) As used in this section, the term "federally chartered or insured financial institution" means—

(1) a bank with deposits insured by the Federal Deposit Insurance Corporation;

(2) an institution with accounts insured by the Federal Savings and Loan Insurance Corporation;

(3) a credit union with accounts insured by the National Credit Union Administration Board;

(4) a Federal home loan bank or a member, as defined in section 2 of the Federal Home Loan Bank

Act (12 U.S.C. 1422), of the Federal home loan bank system; or

(5) a bank, banking association, land bank, intermediate credit bank, bank for cooperatives, production credit association, land bank association, mortgage association, trust company, savings bank, or other banking or financial institution organized or operating under the laws of the United States.

5. 18 U.S.C. 1344 provides:

Bank fraud

Whoever knowingly executes, or attempts to execute, a scheme or artifice—

(1) to defraud a financial institution; or

(2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;

shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

REPLY BRIEF

No. 13-316

IN THE

Supreme Court of the United States

KEVIN LOUGHRIN,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On a Writ of Certiorari to
the United States Court of Appeals
for the Tenth Circuit

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REPLY BRIEF FOR THE PETITIONER

I. Introduction

The United States defends the court of appeals' rule that the federal bank fraud statute is violated so long as the defendant intended to defraud *someone* in order to obtain money in a bank account, even if he did not intend to deceive a bank and even if the scheme poses no risk of any loss to a financial institution. That interpretation would give the federal bank fraud statute extraordinary sweep, covering literally *every* fraudulent scheme in which the victim pays the perpetrator with a check. In every such case, the Government will be able to prove that the defendant intended to defraud *someone* (the non-bank victim) in order to "obtain[] money from a bank as part of the scheme," U.S. Br. 24 (citation and quotation marks omitted), because he will eventually exchange the check for money in a bank account. *See* Petr. Br. 27-28 (collecting examples).

The variety of covered schemes is almost limitless: the teenager selling subscriptions door-to-door, but never intending to deliver the magazines; the roofing contractor who takes the check and never returns to do the work; the vendor selling fake designer clothes; the funeral home padding its bills with bogus line items; the employee submitting false expense reports; or the con artist selling counterfeit lottery tickets.

The Government makes little effort to explain why Congress would have intended the bank fraud statute to have such enormous breadth, effectively federalizing state law crimes that are admittedly "tangential to the banking system," U.S. Br. 24,

which the statute was designed to protect. Instead, the Government offers a narrowing construction. But its proposed interpretation is as pointless as it is strange. The Government effectively proposes to replace intent to defraud a bank with intent to use false statements of the sort one would expect from someone intending to defraud a bank – *i.e.*, statements that "foreseeably or inherently" would be directed toward a bank and "would naturally influence it with respect to property in its custody." U.S. Br. 41. The Government points to nothing in text or precedent for such a rule, which substitutes *evidence* of intent to defraud a bank for an actual *finding* of intent to defraud a bank, using concepts borrowed from the law of negligence.

And for no good reason. The principal difference between the rule petitioner defends and the one the Government invents is that the Government's rule would ease prosecution of altered check schemes. But intent to defraud a bank is easily proven in many altered check cases, as when an altered check is negotiated at a bank. That leaves cases, like this one, in which the defendant uses an altered check to obtain property from a third party like Target. But the Government's interpretation is unnecessary to facilitate prosecution in such cases as well. First, third party altered check schemes are punished by Section 513 (which criminalizes use of altered bank instruments to deceive *anyone*) not Section 1344 (which criminalizes schemes to fraudulently obtain money or property "owned by, or under the custody or control of, a financial institution," not schemes to obtain the money or property of a department store). *See* Petr. Br. 29-36. Second, even if the Court were to

conclude otherwise, the Government's rule is unnecessary because the lower courts have easily found intent to defraud a bank satisfied by use of an altered check, even in third party cases. *See, e.g.*, *United States v. Morganfield*, 501 F.3d 453, 463-65 (5th Cir. 2007); *United States v. Donegan*, 97 Fed. Appx. 649, 651 (7th Cir. 2004) ; *United States v. Crisci*, 273 F.3d 235, 240 (2d Cir. 2001).

If the Court is to reject the intent-to-defraud-a-bank requirement, the more sensible narrowing construction is the one applied by the lower courts for many years, requiring proof that the defendant's scheme knowingly exposed a bank to risk of loss, consistent with the statute's purpose of protecting banks' financial integrity.

II. Intent To Defraud A Bank Is An Essential Element Of Every Bank Fraud Prosecution.

This Court will not "approve a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress." *Cleveland v. United States*, 531 U.S. 12, 24 (2000). In this case, the Government and the Tenth Circuit have acknowledged the breadth of their proposed interpretation of Section 1344. Pet. App. 6a-7a; U.S. Br. 24. But the Government has failed to satisfy its heavy burden of justification.

A. Subsection (2) Does Not Dispense With The Government's Burden To Prove Intent To Defraud A Bank.

The Government begins by insisting that subsection (2) establishes an independent offense that dispenses with the intent-to-defraud-a-bank

element of subsection (1). *See* U.S. Br. 17-29. The premise of that argument is wrong, *see infra* § II.B, but the argument fails on its own terms in any event.

The Government accepts that intent to defraud a bank has two essential components: (1) intent to deceive a bank, (2) in order to obtain bank property or otherwise injure a bank's property interests. U.S. Br. 18-19. Section 1344(2) encompasses both requirements.

1. The United States does not seriously dispute that the second component of intent to defraud a bank – *i.e.*, intent to obtain bank property – is required by subsection (2). *See* U.S. Br. 22. The Government notes that subsection (2) protects a broad "range of property interests common in banking contexts." U.S. Br. 20. But it does not claim that any of those property interests fall outside the scope of subsection (1). For example, a defendant who used false identification to obtain the contents of a bank customer's safe deposit box surely would be found to intend "to defraud a financial institution" within the meaning of subsection (1), even though the property obtained was only in the bank's custody.

2. Subsection (2) is also reasonably read to require that the defendant intended to deceive a bank. The United States acknowledges that the defendant must intend to obtain bank property through intentional deception. *See* U.S. Br. 23. The only question is whether the target of the deception must be a bank or just *someone*.

a. ***Text***. The text does not specify *at whom* the "false or fraudulent pretenses, representations, or promises" must be directed. 18 U.S.C. § 1344(2). The

Government proposes to fill that statutory silence with "*anyone*," but that is hardly an inescapable inference. *See* Petr. Br. 24.

The Government argues that its broader reading is compelled because it is logically possible for a false statement directed at someone other than a bank (*e.g.*, a bank customer) to result in the defendant "obtain[ing] bank-held funds." U.S. Br. 23.[1] But this Court rejected a nearly identical argument, regarding materially indistinguishable statutory language, in *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662 (2008). There, the Court construed a provision of the False Claims Act (FCA) that at the time imposed liability upon anyone who "knowingly makes . . . a false record or statement to get a false or fraudulent claim paid or approved by the Government." *Id.* at 668 (quoting 31 U.S.C. § 3729(a)(2) (2008)). Thus, like Section 1344(2), the FCA provision prohibited "knowing[]" schemes to use

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[1] At times, the Government appears also to argue that the statute's intent requirement applies only to the "object" of the scheme (*i.e.*, obtaining bank property) and not to its "means" (*i.e.*, through a false representation). U.S. Br. 23. If that were true, the Government would not need to prove intent to deceive a bank even if the statute expressly covered obtaining bank property "by means of false [statements] *to a financial institution*." But the statute criminalizes "knowingly" executing a particular kind of scheme, described by both its means and its ends. As a consequence, the knowledge requirement applies to all of the non-jurisdictional elements of the offense, including both means and ends. *See Flores-Figueroa v. United States*, 556 U.S. 646, 650 (2009).

fraudulent means (a "false record or statement") to obtain property of a specified victim ("to get" a false claim "paid or approved by the Government"). And also like Section 1344(2), the FCA provision did not specify to whom the false statement must be directed.

The court of appeals read that silence, as the Government does in this case, to encompass false statements to *anyone* so long as the "false statement resulted in the use of Government funds to pay a false or fraudulent claim." *Id.* at 668. In particular, the court held that it was sufficient that the defendant, a subcontractor on a Navy construction project, made false statements to the project's prime contractor in order to obtain payment from the prime contractor with government funds. It was not necessary, the court held, to prove that the defendant intended for the false statement to reach and deceive the federal government into paying a false claim. *Id.*

This Court unanimously rejected that interpretation. While the defendant need not have presented the false statement directly to the government, the Court held, the defendant must have *intended* for the false statement to mislead the Government into paying a false claim. *Id.* at 671. "If a subcontractor or another defendant makes a false statement to a private entity and does not intend the Government to rely on that false statement as a condition of payment, the statement is not made with the purpose of inducing payment of a false claim 'by the Government.'" *Id.* at 671-72.

The same construction of the parallel language of the bank fraud statute requires the same result here. It is not enough that a defendant intended to deceive *someone* – an employer, a client, a merchant, etc. – in

a way that results in a bank giving the defendant money from a bank account. The language is most sensibly read to require that the defendant intend for the false statement to deceive a bank into paying the money to the defendant. Which is simply another way of saying that the defendant must intend to defraud the bank itself.

b. ***Structure***. The Government complains that petitioner's interpretation renders subsection (2) surplusage, U.S. Br. 24, but the Government's own interpretation "produces an overlap not unlike the one it purports to avoid." *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 253 (1994). If subsection (2) criminalizes attempts to obtain bank property by deceiving *someone*, it surely covers schemes intended to obtain bank property by deceiving a bank directly. So it is difficult to imagine a scheme "to defraud a financial institution" covered by subsection (1) that is not also covered by the Government's reading of subsection (2). Moreover, even if there were some schemes that could only be prosecuted under the first subsection under the Government's interpretation, the Solicitor General offers no explanation why Congress would have required prosecutors to prove intent to defraud a bank only for the sliver of cases it could not also prosecute under subsection (2).

Furthermore, if Congress had intended the Government's interpretation, it would have been more natural to retain and modify the instrumentality clause of the mail fraud statute, substituting use of a bank for use of the mails. *See* Petr. Br. 24-25. But instead, Congress eliminated the instrumentality clause altogether, founding federal jurisdiction on the identity of the victim.

c. ***Purposes***. The Government does not seriously contest that the purpose of the statute is to protect the financial integrity of banks, not to provide a vehicle for federalizing garden-variety frauds that pose no threat to that interest. *See* U.S. Br. 34-37. It claims, instead, that the breadth it seeks is necessary to protect banks from schemes like petitioner's. Not so.

The Government emphasizes that altered check schemes, even when directed at others, pose financial risks for banks. U.S. Br. 36-37. But the Tenth Circuit did not dispense with the intent-to-defraud-a-bank element only in altered check cases. As a result, its interpretation permits conviction in cases involving entirely valid checks that pose no risk whatsoever to a bank's financial interests. *See* Petr. Br. 27-28.

Moreover, the intent-to-defraud-a-bank element does not pervasively preclude conviction in altered check cases. For example, a defendant who negotiates an altered check at a bank clearly intends to defraud the bank. Petitioner and the United States disagree about whether intent to defraud a bank can be established when the defendant uses altered checks to obtain property from a third party. *See infra* § II.B. But even when the Government cannot prove intent to defraud a bank, Congress addressed the inherent risk of fraudulent banking instruments in Section 513, punishing use of altered checks to deceive anyone even if the prosecution cannot prove intent defraud a bank. *See* Petr. Br. 34-36. If the Court believed that Congress also intended Section 1344 to cover third party altered check frauds, that would be a reason to hold that use of an

altered check is sufficient evidence to prove intent to deceive both the immediate victim and a bank. *See e.g.*, *United States v. Crisci*, 273 F.3d 235, 240 (2d Cir. 2001). It would not be a reason to dispense with the intent-to-defraud-a-bank element, even in cases having nothing to do with altered checks.

d. ***Legislative History.*** Finally, even if the Government could satisfy its clear statement burden through resort to legislative history, it has failed to do so here.

Contrary to the Government's implication, the Department of Justice's objection to one early proposal was not that it was limited to schemes intended to defraud banks, or that it failed to encompass schemes to defraud third parties out of funds deposited in a financial institution. Instead, the Department worried that because the proposed bill was not modeled on the mail fraud statute, its new language would be subject to dispute and might not encompass bank fraud schemes that "involve the deprivation of an intangible right or interest," like a bank's right to honest services of its employees. *Financial Bribery and Fraud: Hearing Before the Subcomm. on Crim. Justice of the House Comm. on the Judiciary,* 98th Cong., 2d Sess. 12 (1984). The Department accordingly asked that the bill include "the phrase 'a scheme or artifice to defraud,'" – that is, the language that is now in Section 1344(1), which the Government acknowledges requires intent to defraud a bank – believing that this language in the mail fraud statute encompassed honest services fraud against banks. *Id.*

Likewise, the references to *United States v. Maze*, 414 U.S. 395 (1974), simply show that

Congress was concerned that the principle *Maze* established – that use of the mails must be part of the execution of the scheme – made it difficult to prosecute a wide range of bank fraud schemes under the mail fraud statute. *See, e.g.*, S. Rep. No. 98-225, at 377-78 (1983). Nothing in the legislative history suggests that Congress responded to *Maze* by criminalizing nearly every fraud directed at anyone with a bank account. Moreover, Congress addressed the particular credit card fraud encountered in *Maze* in a different provision of the same statute. *See* Pub. L. 98-473, Title II, § 1602(a), 98 Stat. 2183 (codified at 18 U.S.C. § 1029).

B. Section 1344 Defines A Single Offense Requiring Proof Of Intent To Defraud A Bank In All Prosecutions.

The Government's position is also irreconcilable with this Court's decisions construing the parallel clauses of the mail fraud statute as establishing a single offense, with the second clause elaborating, rather than expanding beyond, the first. *See* Petr. Br. 15-23.

1. Perhaps hoping the third time's the charm, the Government argues that the two clauses of the bank fraud statute must be treated as separate offenses, for the same reasons it gave for reading the mail fraud statute that way in *McNally v. United States*, 483 U.S. 350 (1987), and *Cleveland v. United States*, 531 U.S. 12 (2000): it points to the word "or," notes that the statute was intended to have a broad reach, and cites the canon against surplusage. U.S. Br. 25-26, 29. But if those arguments are right, then *McNally* and *Cleveland* were wrong.

The Solicitor General says that the statutes should nonetheless be given different constructions because at the time the bank fraud statute was enacted, some courts of appeals had wrongly viewed the mail fraud statute as disjunctive. U.S. Br. 26-27. The Government cites nothing in the legislative history that suggests Congress relied upon (or even was aware of) those appellate decisions. Moreover, the argument assumes either that Congress intended to incorporate lower court case law even if it *wrongly* construed the mail fraud statute, or that *McNally* was wrong when it declared what the bank fraud statute had meant since 1909. Neither assumption is plausible.

Instead, the only reasonable reading of the text and history of the statute is that Congress intended the common features of the bank, mail, and wire fraud statutes to be read in tandem, as construed by *this* Court. *See Neder v. United States*, 527 U.S. 1, 20-21 (1999). Any other conclusion would lead to the anomalous result that even identically worded statutes could have radically different meanings depending on the state of the law in the lower courts at the time the language was copied. For example, by the Government's logic, the bank fraud statute has always covered honest services fraud – before and after *McNally*, without any need for additional legislation – because that was the circuits' incorrect view of the mail fraud statute when Section 1344 was enacted.

The Government argues that the reasons this Court gave for its interpretation of the mail fraud statute do not apply to the bank fraud statute. U.S. Br. 30-32. But those arguments are beside the point,

which is that Congress intended the bank fraud statute to be construed in tandem with its mail fraud model. *See* Petr. Br. 21.

2. Nothing in the textual differences between the mail and bank fraud statutes show that Congress intended Section 1344(2), unlike its mail fraud counterpart, to establish an independent offense that dramatically expands the statute. *See* Petr. Br. 21-23.

The Government points to stylistic differences between the two statutes. U.S. Br. 26. But if Congress had intended the two-clause structure of the bank fraud statute to be read radically differently from the statute upon which it was based, it surely would have conveyed that intent through means more transparent than paragraph numbering and hard returns. The "more logical explanation for the restructuring is that it broke up a lengthy principal paragraph . . . into a more readable statute," consistent with modern statutory drafting styles. *United States v. O'Brien*, 560 U.S. 218, 233-34 (2010).

C. The Government's Newly Minted Narrowing Construction Is Implausible, And Does Not Solve The Deficiencies Of Its Position.

Perhaps aware of the untenable reach of the statute under its preferred interpretation, the Government offers – for the first time in this case or, as far as petitioner can tell, *any* case – a novel narrowing construction. The Government proposes that rather than being required to prove intent to defraud a bank, prosecutors must prove only that the defendant's scheme would "foreseeably or inherently

direct false or fraudulent statements to a bank, and would naturally influence it with respect to property in its custody." U.S. Br. 41. Under that interpretation, the Government could prosecute individuals who intend only to defraud a bank customer, so long as the nature of the scheme would "naturally entail the customers' passing the false or fraudulent representations to the bank in a fashion that would influence the bank's actions." *Id.*

1. The Government does not claim any textual basis for this rule. As between petitioner's interpretation (which requires the Court to fill in a statutory *silence* regarding to whom the false statement must be directed, *see supra* pp. 4-5) and the Government's (which requires the Court to insert an extra-textual limitation on the kinds of "false or fraudulent pretenses, representations, or promises" actionable under the statute, 18 U.S.C. § 1344(2)), petitioner's is far more faithful to the text.

2. The Government's narrowing construction is also odd. Even while insisting that Congress did not intend to limit Section 1344(2) to schemes intended to defraud banks, the Government's narrowing construction focuses on the same basic issue – the likelihood that the defendant intended to defraud a bank and that a bank would, in fact, be defrauded. The Government's rule simply takes the ultimate question away from the jury, effectively imposing an irrebuttable presumption of intent to defraud a bank once the Government proves a particular set of facts (*i.e.*, use of false statements that could foreseeably deceive a bank regarding disposition of bank property) from which a jury might plausibly draw an inference of intent to defraud a bank. But such

presumptions are, at best, disfavored in criminal law. *See, e.g.*, *Sandstrom v. Montana*, 442 U.S. 510, 522-23 (1979).

At the same time, the Government's rule permits conviction when a defendant did not *in fact* intend for a false statement to make its way to a bank, so long as the possibility of bank deception was "forseeabl[e]." U.S. Br. 40. But importing a tort law principle of negligence into the criminal bank fraud provision would mark a dramatic departure from the mail fraud statute upon which Section 1344 is based, under which the Government must show specific intent to deceive the victim. *See, e.g.*, *United States v. Stephens*, 421 F.3d 503, 509 (7th Cir. 2005). Perhaps the Government would still require proof that the defendant specifically intended to deceive the bank customer, through means that risk negligent deception of a bank, but that does not make its interpretation any less odd and unprecedented.

Ultimately, the Government offers no explanation why Congress would have required an actual finding of intent to defraud a bank under subsection (1), yet concluded that indirect evidence *suggesting* intent to defraud a bank was good enough under subsection (2), particularly given the substantial overlap between the two provisions.

3. The Government's narrowing construction also fails to give the statute a more reasonable scope. While the interpretation would exclude *some* of the Government's more egregious prosecutions, the statute would continue to reach every case in which a defendant purchases groceries or gasoline with a check the defendant knows will bounce. *See United States v. Orr*, 932 F.2d 330 (4th Cir. 1991)

(prosecution of such a scheme). The check would "foreseeably or inherently be directed to the bank and have the potential to influence" the disposition of bank property, U.S. Br. 40, given the possibility that the bank might choose to (or mistakenly) honor the check, wrongly believing that the defendant will correct the deficiency in his account and make good on the promise of payment, *see id.* 7 n.3.

4. Even if the Government's rule did not threaten to turn the bank fraud statute into a federal "bad check" law, there would be no reason to prefer it over the intent-to-defraud-a-bank standard. Both rules are readily satisfied in paradigmatic bank fraud cases (*e.g.*, check kiting, lies on loan applications, self-dealing by bank employees), in which intent to defraud a bank is readily established. And intent to defraud a bank is easily proven in many altered check cases, such as schemes in which an altered check is negotiated at a bank. *See* Petr. Br. 30.

Accordingly, the principal function of the Government's alternative is to facilitate prosecutions of defendants, like petitioner, who defraud third parties with altered checks. But as discussed below, such schemes fall outside the scope of Section 1344 for the independent reason that they are intended to obtain the property of the third party victim, not property "owned by, or under the custody or control of, a financial institution." 18 U.S.C. § 1344(2); *see infra* pp. 17-19. Those crimes are punished under Section 513, which is *precisely* tailored to such cases, punishing anyone who uses any altered bank instrument "with intent to deceive *another person*" regardless of his intent with respect to the bank and

regardless of whose property is targeted by the scheme. 18 U.S.C. § 513(a) (emphasis added).

The Government disagrees, but even if it is right that Section 1344 encompasses schemes to defraud merchants using altered checks, there is *still* no reason to adopt the Solicitor General's narrowing construction to facilitate prosecutions in such cases. Even in circuits requiring intent to defraud a bank, the Government has frequently obtained convictions in third party altered check cases. *See, e.g.*, *United States v. Morganfield*, 501 F.3d 453, 463-65 (5th Cir. 2007); *United States v. Donegan*, 97 Fed. Appx. 649, 651 (7th Cir. 2004); *United States v. Crisci*, 273 F.3d 235, 240 (2d Cir. 2001). Consistent with these decisions, if the Court concludes that Section 1344 encompasses third party altered check frauds, it should hold that intent to defraud a bank is required in every prosecution, but can be satisfied by evidence that the defendant used an altered check. As discussed next, that interpretation would not save the conviction in this case, but that is no reason to distort the statute.

D. If Intent To Defraud A Bank Is Required, The Jury Instructions And Evidence Were Insufficient.

The Government does not contest that if intent to defraud a bank is required, the jury instructions were insufficient. *See* U.S. Br. 44 (arguing only that jury instructions were sufficient under the Government's

newly proposed narrowing construction).[2] Nor has the Government ever argued that any instructional error was harmless. Accordingly, if the Court accepts petitioner's interpretation of the statute, his conviction must at the very least be vacated.

But there is no basis for a retrial because there was insufficient evidence to prove petitioner intended to defraud a bank. *See Tibbs v. Florida*, 457 U.S. 31, 40-41 (1982). Intent to defraud a bank has two components: (1) intent to deceive a bank; and (2) intent to thereby obtain bank property. *See supra* p. 4. In this case, even if using an altered check were sufficient to show that petitioner intended to *deceive* a bank, there was insufficient evidence to show that his scheme was intended to obtain property "owned by" or in the "custody or control of" a bank, rather than Target. *See* Petr. Br. 29-36.

1. This argument is available to petitioner. *Contra* U.S. Br. 44-46. The Government acknowledges that petitioner "argued on appeal that the evidence was insufficient '*if* an intention to defraud a bank is required.'" *Id.* 45 (citation omitted). Petitioner makes the same argument now – the evidence is insufficient because intent to defraud a bank requires proof that the defendant intended to obtain bank (not merchant) property through fraudulent means.

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[2] Because the Government never argued below that the jury instructions were valid under its new narrowing construction, the argument is waived. *See* Petr. Br. 30 n.15.

The Government inexplicably claims that petitioner "limited his certiorari petition to challenge the jury instructions and did not seek review on any sufficiency-of-the-evidence question," citing the Question Presented. U.S. Br. 45. But the Question Presented simply asks what "the Government must prove." Pet. i. Petitioner's argument that the Government's evidence did not prove what must be proven falls squarely within the scope of that question. Pet. i; *see also* Pet. 6; Pet. Reply 3 n.1.

2. The Government makes almost no effort to show how petitioner's scheme was intended to obtain bank property as required by the text of the statute. It argues instead that for "petitioner's scheme to work, Target had to accept his fraudulent checks," U.S. Br. 46, and that the scheme would work *best* if banks actually honored the checks (because it would delay detection), *id.* 47; *but see* Petr. Br. 32. However, even if there were a factual basis for this claim, it would simply show that petitioner intended for *Target* to obtain bank money; it would not transform the merchandise *petitioner* "obtain[ed]" from Target into property "owned by, or under the custody or control of, a financial institution." 18 U.S.C. § 1344(2). The Government's reliance on mail fraud precedents is thus inapt because under the mail fraud statute it makes no difference *whose* property the defendant obtains, so long as the mail is used to execute the scheme. U.S. Br. 46-47. The bank fraud statute, on the other hand, does not criminalize frauds in which a bank is used to execute the scheme; it criminalizes schemes to obtain bank property.

The Government cannot (and, in fact, does not) argue that the *merchandise* petitioner obtained from Target by means of altered checks should be treated as the equivalent of the *money* Target *might have* obtained from a bank in exchange for the checks (if it had submitted all the checks for payment, and if those checks had been honored). And this Court has rejected that kind of argument in *Allison Engine*. There, the Court held that it was not enough that the defendant used a false statement to obtain payment from a government contractor, even though the money ultimately came from the federal government. The Court explained that "getting a false or fraudulent claim 'paid . . . by the Government' is not the same as getting a false or fraudulent claim paid using 'government funds.'" 553 U.S. at 669 (first quotation from 31 U.S.C. § 3729(a)(2)). Instead, "a defendant must intend that the Government itself pay the claim." *Id.* Likewise, under Section 1344(2), the defendant must intend that his scheme result in obtaining money owned by, or under the custody or control of, a bank itself.

III. To Violate Section 1344, A Defendant's Scheme Must Knowingly Expose A Bank To Risk Of Loss.

If the Court holds that intent to defraud a bank is required, it must reverse petitioner's conviction and need proceed no further. But if the Court holds that Section 1344 encompasses fraud against *anyone* to obtain money in a bank account, it should at least adopt the well-developed narrowing construction applied for many years in the lower courts and limit the statute to cases in which the defendant's scheme knowingly exposes a bank to risk of loss.

1. The Government begins by quibbling with petitioner's articulation of the question to be decided, claiming that the Question Presented encompasses only whether a *subjective* intent to expose a bank to risk of loss is required and excludes the possibility of an *objective* test. U.S. Br. 47-48. However one reads the Question Presented, the precise nature of the test is fairly encompassed within it and is part of the circuit conflict this Court granted certiorari to resolve. *See* BIO 8-9 (describing conflict as over whether Government must prove "that the defendant exposed, or intended to expose, a bank to risk of financial loss"); Pet. 9-12 (collecting cases).

To be clear, however, petitioner believes that the language of the statute – which criminalizes only "knowing[]" conduct, 18 U.S.C. § 1344 – best accords with the test articulated by the First Circuit and Second Circuits: the Government must show the defendant's "knowledge that his fraudulent actions would expose some bank to a risk of loss." *United States v. Ayewoh*, 627 F.3d 914, 922 (1st Cir. 2010) (en banc); *see also United States v. Nkansah*, 699 F.3d 743, 749 (2d Cir. 2012) (same). Under that standard, causing the loss need not be the scheme's objective or purpose, but to establish criminal culpability, the Government must show at least knowledge that the scheme exposed a bank to such a risk.[3]

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[3] If the prospect of relieving unsophisticated defendants from criminal liability is intolerable, *see* U.S. Br. 48-49, that would be a reason to adopt an objective test, not grounds to leave in place the court of appeals' unbounded interpretation.

2. This Court does not lightly presume that Congress intended a federal criminal statute to displace state legislative judgment and prosecutorial discretion with respect to the appropriate regulation and punishment of garden-variety frauds. *See, e.g.*, *Cleveland v. United States*, 531 U.S. 12, 24 (2000). Instead, the Court should presume that Congress intends to limit federal criminal jurisdiction to cases genuinely implicating federal interests – here, the interest in protecting the financial integrity of federally related banks. Interpreting the bank fraud statute to cover fraud that threatens no loss to a financial institution would eliminate the connection between the statute and that basic purpose, as well as the constitutional power upon which the provision is premised.

The Government's arguments to the contrary are not convincing. Having just proposed an a-textual limitation on the statute to avoid excessive breadth, U.S. Br. 40-44, the Government shows no sense of irony in complaining that the risk-of-loss requirement "has no basis in the text" of Section 1344, *id.* 49. In fact, the risk-of-loss limitation bears the same relationship to the text as the Government's rule – it can be seen as an "understanding of the 'means' required by Section 1344(2) to obtain bank property," U.S. Br. 41, limiting prosecutions to cases in which the means employed knowingly risk loss to a bank and, therefore, injury to the interests the statute was enacted to protect. But unlike the Government's narrowing construction, the risk-of-loss requirement is well grounded in the purposes of the statute, as well as principles of lenity and federalism. *Cf. Skilling v. United States*, 130 S. Ct. 2896, 2928

(2010) (paring criminal statute "down to its core" to avoid vagueness concerns arising from statute's potential breadth).

The Government's practical objections to the risk-of-loss requirement are likewise unsound. The Government ignores that in the vast majority of prosecutions, the requirement can be applied without difficulty or even serious dispute. There is no question, for example, that paradigmatic bank fraud cases knowingly expose banks to risk of loss. Conversely, when the defendant simply obtains a valid check from a non-bank victim, there is also no difficulty because the scheme plainly poses no risk to any bank. *See, e.g.*, *United States v. Laljie*, 184 F.3d 180, 190 (2d Cir. 1999).

The Government's complaints are founded instead almost exclusively on the rule's application to altered check schemes. U.S. Br. 51-55. But even in that context, the Government exaggerates the difficulty. For example, the U.C.C. need not be consulted when the defendant uses a false check written on a non-existent or closed account. *See* Petr. Br. 31. And the Government itself points out that banks must deal with altered checks on a regular basis, apportioning responsibility for losses among themselves, and between themselves and their customers. U.S. Br. 52. While the rules may sometimes be complicated, they are well known in the industry and can be explained to a jury through expert testimony or, as in this case, through bank witnesses who must be called in any event. *See* Petr. Br. 3-4. Indeed, juries are frequently required to resolve disputes under the U.C.C. *See* Margaret L. Moses, *The Jury-Trial Right in the UCC: On a*

Slippery Slope, 54 SMU L. REV. 561, 562 (2001) (noting that "in cases arising under the UCC, parties will almost always have a jury-trial right in federal court").

The Government likewise complains that a risk-of-loss requirement would require some elaboration. U.S. Br. 53-54. But in contrast with the rule the Government proposes, the basic contours of the test are well established in the lower courts and the guiding principles should be relatively clear, drawing upon the purposes of the statute and traditional fraud principles.

Finally, the fact that risk of loss may vary depending on the form of check fraud may reflect a seeming arbitrariness in the U.C.C., but that does not render the risk-of-loss test itself arbitrary – it is commonplace that similar conduct may or may not result in criminal liability depending on whether the conduct results in harm (consider the two drunk drivers, only one of whom kills a pedestrian and is charged with manslaughter). And here, the bank fraud statute works in tandem with its companion provision, Section 513: the latter punishes all use of altered checks to deceive, while the more serious punishment of the bank fraud provision is reserved for schemes that can be proven to expose a bank to a genuine risk of loss.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed and the case remanded for proceedings consistent with this Court's opinion.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
FILED

No. 13-316

IN THE

Supreme Court of the United States

KEVIN LOUGHRIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICUS CURIAE*

This brief is submitted on behalf of the National Association of Criminal Defense Lawyers ("NACDL") as *amicus curiae* in support of petitioner.[1]

NACDL is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.

NACDL was founded in 1958. It has a nationwide membership of approximately 10,000 and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization and awards it representation in its House of Delegates.

NACDL files numerous *amicus* briefs each year in the United States Supreme Court and other courts, seeking to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

This case presents a question of great importance to NACDL because of the substantial procedural and

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[1] Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, no counsel for a party authored any part of the brief, nor did any person or entity, other than *amicus* or its counsel, make a monetary contribution to the preparation or submission of this brief.

penal consequences that expanding the scope of the federal bank fraud statute would have on defendants who would otherwise be prosecuted in state court. NACDL has a particular interest in protecting against the unwarranted expansion of federal criminal law to ensure that similarly situated defendants are not treated disparately as a result of the forum in which they are prosecuted.

SUMMARY OF ARGUMENT

The Constitution limits federal power to ensure a balance between the states and federal government that "reduce[s] the risk of tyranny and abuse from either front." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). In keeping with this principle, courts have acknowledged that "preventing and dealing with crime is much more the business of the States than it is of the Federal Government." *Patterson v. New York*, 432 U.S. 197, 201 (1977). In its decision below, however, the Tenth Circuit dispensed with the requirement that a defendant intend to defraud a federally insured or chartered bank and expose it to a risk of loss in order to be convicted under the federal bank fraud statute, 18 U.S.C. § 1344(2), and thereby dramatically expanded the scope of that statute to cover purely local conduct that has historically been prosecuted by the states.

Using this overly broad interpretation, the Tenth Circuit affirmed petitioner's bank fraud conviction for using stolen and altered checks to steal merchandise and cash from a local Target store. The extent of any bank's involvement in the offense was petitioner's use of six altered checks in his scheme to steal from Target. There was no evidence petitioner intended to defraud a bank. Most of the checks were never

submitted to a bank and petitioner's crime never posed any risk of financial loss to a bank.

As a textual matter, Section 1344 cannot reasonably be read to criminalize *every* fraudulent transaction that implicates funds stored in a bank. As a policy matter, the Tenth Circuit's interpretation is part of a larger trend of the expansion of federal criminal law, which has severe consequences on both the state and federal criminal justice systems. Because NACDL and its members have extensive experience with the practical consequences of state and federal prosecutions, it submits this brief to address the policy concerns implicated by the question presented in this case.

First, the dramatic increase in the number of federal criminal offenses threatens to overwhelm the limited resources of the federal courts, which are designed to handle a comparatively smaller number of cases than their state counterparts. Forcing the federal courts to devote an ever-increasing percentage of their time to local crime critically affects their ability to fulfill their constitutional duties, including enforcing constitutional rights and adjudicating civil cases that concern uniquely federal interests.

Second, federalizing crimes that are already subject to prosecution in state courts creates counterproductive competition between state and federal law enforcement and leads to an inefficient use of limited investigative, prosecutorial, and judicial resources.

Third, federalizing crimes that are within the ken of the state courts undermines the role of state courts in enforcing criminal law, leading to the perception that they are unable to deal adequately with

important criminal matters. Despite a significant increase in the number and type of federal crimes, however, state courts continue to adjudicate the vast majority of criminal cases and, for a number of structural and political reasons, are better equipped to handle most run-of-the-mill criminal cases.

Finally, expanding federal criminal law leads to the disparate treatment of similarly situated defendants. The decision to bring charges in federal rather than state court is left entirely to prosecutors' discretion, with little guidance or oversight. Such unfettered prosecutorial discretion increases the danger of prosecuting similarly situated defendants—in some instances, even accomplices to the same offense—in different courts, with vastly different consequences, without sufficient justification for the disparate treatment. Subjecting some defendants to federal prosecution while prosecuting others accused of nearly identical conduct in state courts is problematic considering the numerous critical procedural and substantive differences that exist between the two systems. Moreover, as illustrated by this case, the federal and state sentencing laws can differ substantially. A defendant convicted in state court for conduct that is substantially similar to petitioner's crime would have a recommended sentence of only nine months—more than two years shorter than the sentence petitioner received in federal court.

This case presents a striking example of the dangers of over-federalizing criminal law, which this Court must consider when determining the appropriate reach of the federal bank fraud statute. The Tenth Circuit's excessively broad reading of Section 1344 is not only contrary to the statutory

text; it would also exacerbate these policy problems by expanding that federal statute to reach a wide swath of criminal conduct that has traditionally been the subject of state criminal law. For both reasons, the Court should reverse the judgment below.

ARGUMENT

I. THE TEXT OF THE BANK FRAUD STATUTE DOES NOT SUPPORT THE TENTH CIRCUIT'S HOLDING

The Tenth Circuit held that the federal bank fraud statute, 18 U.S.C. § 1344(2), does not require any proof that the defendant intended to defraud a bank. Instead, under the Tenth Circuit's reading, a defendant may be convicted under Section 1344(2) as long as he obtains funds that have some connection to a bank while intending to defraud someone else. *See United States v. Loughrin*, 710 F.3d 1111, 1116 (10th Cir. 2013) ("[U]nder our precedent, an individual can violate § 1344(2) by obtaining money from a bank while intending to defraud someone else."). The text of the bank fraud statute does not support such an expansive interpretation.

In all subsections of Section 1344, Congress was explicit that the fraud at issue must have a nexus to a federally regulated financial institution. Section 1344 prohibits "knowingly execut[ing], or attempt[ing] to execute, a scheme or artifice" either "to defraud *a financial institution*" or to obtain property "owned by, or under the custody or control of, *a financial institution*." 18 U.S.C. § 1344 (emphases added). This language makes clear that Congress intended Section 1344 to cover only those crimes in which the intended victim is a financial institution; not the petty fraud at issue here that barely implicates the interests of any financial

institution whatsoever. *See, e.g.*, *United States v. Laljie*, 184 F.3d 180, 189-90 (2d Cir. 1999) ("Because § 1344 focuses on the bank, rather than on other potential victims, a conviction under § 1344 is not supportable by evidence merely that some person other than a federally insured financial institution was defrauded in a way that happened to involve banking, without evidence that such an institution was an intended victim."). The majority of the circuit courts that have considered this question agree that both subsections of Section 1344 require proof of intent to defraud a bank. *See United States v. Kenrick*, 221 F.3d 19, 29 (1st Cir. 2000) (en banc), *cert. denied*, 531 U.S. 961 (2000); *United States v. Nkansah*, 699 F.3d 743, 748 (2d Cir. 2013); *United States v. Thomas*, 315 F.3d 190, 197 (3d Cir. 2002); *United States v. Morganfield*, 501 F.3d 453, 465 (5th Cir. 2007); *Bressner v. Ambroziak*, 379 F.3d 478, 482 (7th Cir. 2004).

The Tenth Circuit's contrary interpretation permits Section 1344 to reach countless local crimes that have traditionally been within the exclusive criminal jurisdiction of the states. Adopting this interpretation would threaten to "convert congressional authority . . . to a general police power of the sort retained by the States." *United States v. Lopez*, 514 U.S. 549, 567 (1995). This Court has repeatedly refused to disrupt the delicate, Constitutionally-mandated balance of power between the states and federal government without a clear statement from Congress. *See, e.g.*, *Cleveland v. United States*, 531 U.S. 12, 24 (2000) ("We resist the Government's reading of § 1341 . . . because it invites us to approve a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress."); *United States v. Bass*, 404

U.S. 336, 349 (1971) ("[W]e will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction."). Nothing in the text of Section 1344 provides any indication that Congress intended for this statute to affect such a change in state-federal relations.

On the contrary, the legislative history shows that Congress intended the federal bank fraud statute to reach a relatively narrow category of offenses that victimize federally regulated or insured financial institutions. *See, e.g.*, S. Rep. No. 98-225, at 377 (1983) ("The offense of bank fraud . . . is designed to provide an effective vehicle for the prosecution of frauds in which the victims are financial institutions that are federally created, controlled or insured.")

To the extent that there is ambiguity in the text of Section 1344, the rule of lenity requires courts to adopt the reading that is more favorable to the defendant. As this Court has made clear, "when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." *McNally v. United States*, 483 U.S. 350, 359-60 (1987), *superseded by statute,* 18 U.S.C. § 1346; *see also Burrage v. United States*, No. 12-7515, slip op. at 12 (Jan. 27, 2014) ("Especially in the interpretation of a criminal statute subject to the rule of lenity, we cannot give the text a meaning that is different from its ordinary, accepted meaning, and that disfavors the defendant.") (citation omitted); *Cleveland*, 531 U.S. at 25 ("'[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'") (citation omitted).

II. THE TENTH CIRCUIT'S INTERPRETATION OF SECTION 1344 PROMOTES THE UNWARRANTED EXPANSION OF FEDERAL CRIMINAL LAW

This Court must also consider the practical implications of broadening the scope of federal bank fraud when Congress has not explicitly intended to do so. The Tenth Circuit acknowledged that its reading of Section 1344 enormously expands the reach of federal bank fraud to cover almost any fraudulent transaction. *Loughrin*, 710 F.3d at 1116-17 ("We recognize that our interpretation of § 1344(2) may cast a wide net for bank fraud liability . . . ."). Giving such wide breadth to a federal criminal statute contributes to a trend of expanding federal criminal law to cover conduct that is already criminalized by the states and which state courts are often better equipped to handle. *See, e.g.*, *Thomas*, 315 F.3d at 199 ("The extension [of Section 1344] proposed here by the Government offends the balance of federal and state jurisdiction and our principles of comity by imposing federal law where the federal interest is remote and attenuated."). To be sure, it is the prerogative of Congress to enact new federal crimes where it sees fit, subject to constitutional strictures. In the absence of such a clear directive from Congress, however, courts should not take it upon themselves to increase the number of federal crimes and thereby exacerbate the negative consequences of over-federalization.

A. The Number of Federal Crimes Has Increased Dramatically in the Past Few Decades

For much of the country's history, states defined and prosecuted the majority of criminal conduct, while the federal criminal code was limited to a small number of offenses that interfered directly with the federal government, its employees, or its programs. *See* Task Force on the Federalization of Criminal Law, Am. Bar Ass'n, *The Federalization of Criminal Law* 7 (1998) [hereinafter ABA Task Force]. This traditional division of power has markedly shifted over the past few decades.

Although the exact number of federal crimes is difficult to measure,[2] the estimated number of criminal offenses in the U.S. Code increased from 3,000 in the early 1980s to over 4,450 by 2008. *See* Brian W. Walsh & Tiffany M. Joslyn, *Without Intent: How Congress is Eroding the Criminal Intent Requirement in Federal Law* (Heritage Found., D.C., & Nat'l Ass'n of Criminal Def. Lawyers, D.C.), Apr. 2010, at 6. This estimate does not include the tens of thousands (or more) of additional criminal offenses scattered throughout federal administrative regulations; nor does it include statutes, such as the Lacey Act, that create federal crimes by incorporating the laws of other jurisdictions. *Id.*

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[2] Determining the exact number of federal crimes is difficult because the offenses are scattered throughout the U.S. Code and federal administrative regulations. Additionally, the number of criminal offenses created by a single statute may be subject to varying interpretations as many statutes encompass a variety of actions and could be read as creating multiple independent crimes. *See generally* ABA Task Force at 9-10.

This expansion of federal criminal law is a relatively recent phenomenon. According to a 1998 report by the American Bar Association's Task Force on the Federalization of Criminal Law, forty percent of all federal criminal statutes enacted since the Civil War were enacted between 1970 and 1996. *See* ABA Task Force at 7. Congress created another 452 new crimes between 2000 and 2007, averaging approximately fifty-six new federal crimes each year. *See* John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, Legal Memorandum No. 26 (Heritage Found., D.C.), June 16, 2008, at 1. The rate of new criminal legislation has remained consistent since the 1980s, with roughly five hundred new crimes created every decade. *Id.* at 1-2.

As the number of federal crimes has grown, so too has the number of defendants prosecuted in federal courts. In 1996, the federal government filed charges against 67,700 defendants in U.S. district courts. That number increased to 83,963 defendants in 2000 and reached an all-time high of 102,931 defendants in 2011. *See* Admin. Office of the U.S. Courts, *2011 Annual Report of the Director: Judicial Business of the United States Courts*, tbl. D; Admin. Office of the U.S. Courts, *2000 Annual Report of the Director: Judicial Business of the United States Courts*, tbl. D; Admin. Office of the U.S. Courts, *1997 Annual Report of the Director: Judicial Business of the United States Courts*, tbl. D.

B. New Federal Crimes Cover Local Conduct That Has Historically Been Prosecuted by the States

Many new federal crimes are already covered by state law. As commentators have noted, "[n]ew crimes are often enacted in patchwork response to

newsworthy events, rather than as part of a cohesive code developed in response to an identifiable federal need." ABA Task Force at 14-15. Many new federal criminal statutes are passed because they are politically popular and not because of an inability by state courts to deal with the conduct at issue. *See generally* William H. Rehnquist, *The 1998 Year-End Report of the Federal Judiciary*, The Third Branch (Admin. Office of the U.S. Courts), Jan. 1999 [hereinafter 1998 Year-End Report] ("The pressure in Congress to appear responsive to every highly publicized societal ill or sensational crime needs to be balanced with an inquiry into whether states are doing an adequate job in these particular areas . . . .").

As a result, areas of dual state and federal criminal jurisdiction are becoming the norm. While federal criminal statutes were initially limited to uniquely federal offenses such as treason, bribery of a federal official, and perjury in federal court, *see* ABA Task Force at 5-6, federal law now reaches many crimes that were traditionally thought to be of exclusively local concern, such as theft, assault, domestic violence, robbery, and murder.

The shift in the focus of federal criminal law from conduct that implicates federal interests to conduct that is primarily local in nature is also evident from changes in the federal case load. In 1947, criminal statutes that had no direct state or local counterparts accounted for twenty-six percent of all federal cases, while immigration offenses, which also implicate important federal interests, accounted for another eighteen percent. *See* ABA Task Force at 23. In other words, just under half of all federal cases dealt with uniquely federal crimes. In 2012, drug offenses alone,

which almost always have a state law equivalent, accounted for more than thirty percent of federal cases. *See* Admin. Office of the U.S. Courts, *2012 Annual Report of the Director: Judicial Business of the United States Courts*, tbl. D-2 [hereinafter 2012 Judicial Business of the U.S. Courts].

As the increasing number and variety of federal criminal offenses show, the federalization of criminal law has created a largely redundant federal criminal justice system that supplants, rather than complements, the state system.

C. Some Prosecutors and Courts Have Further Expanded Federal Criminal Law in the Absence of Clear Congressional Intent

While much of the federalization of criminal law is a result of congressional legislation that explicitly creates new federal crimes, some federal prosecutors and courts have contributed to the expansion of federal criminal law by advocating for and approving broad interpretations of imprecise statutory language to reach conduct not previously subject to federal prosecution. That is exactly what the Tenth Circuit has done in this case.

As Justice Scalia recently warned,

> We face a Congress that puts forth an ever-increasing volume of laws in general, and of criminal laws in particular. It should be no surprise that as the volume increases, so do the number of imprecise laws. And no surprise that our indulgence of imprecisions that violate the Constitution encourages imprecisions that violate the Constitution. Fuzzy, leave-the-details-to-be-sorted-out-by-

> the-courts legislation is attractive to the Congressman who wants credit for addressing a national problem but does not have the time (or perhaps the votes) to grapple with the nitty-gritty.

Sykes v. United States, 131 S. Ct. 2267, 2288 (2011) (Scalia, J., dissenting).

Whatever the wisdom of Congress' decision to federalize criminal law, it is not the role of the courts to affect such significant changes in federal-state relations, especially in light of the grave policy concerns that accompany this shift.

III. THE OVER-FEDERALIZATION OF CRIMINAL LAW HAS NUMEROUS ADVERSE CONSEQUENCES

Broad expansion of the federal bank fraud statute increases the dangers that accompany "'the accumulation of excessive power in any one branch.'" *New York v. United States*, 505 U.S. 144, 181 (1992) (citation omitted). Under the Tenth Circuit's incorrect reading, Section 1344 sweeps in countless instances of purely local conduct that, in light of history and a proper balance of power, belong in state rather than federal court. *See generally Scheidler v. Nat'l Org. for Women, Inc.*, 547 U.S. 9, 20 (2006) (holding that the government's broad interpretation of the Hobbs Act "would federalize much ordinary criminal behavior, ranging from simple assault to murder, behavior that typically is the subject of state, not federal, prosecution"); *Cleveland*, 531 U.S. at 24 ("Equating issuance of licenses or permits with deprivation of property would subject to federal mail fraud prosecution a wide range of conduct traditionally regulated by state and local authorities."). Bringing primarily local conduct—such

as the petty fraud at issue here—within the jurisdiction of the federal courts adversely affects not only the individual defendants subject to prosecution, but the entire administration of state and federal criminal law.

A. Increasing the Number of Federal Crimes Overwhelms the Limited Resources of Federal Courts

In keeping with the Constitution's mandate that federal courts be courts of limited jurisdiction not intended to replace the state court system, federal courts were designed to adjudicate only a small number of disputes involving important national interests. As a result, federal courts are not equipped to handle the ever-increasing docket that results from the over-federalization of criminal law. *See* 1998 Year-End Report ("The trend to federalize crimes that traditionally have been handled in state courts . . . is taxing the Judiciary's resources and affecting its budget needs . . . ."); *see also* Ronald Goldstock, Gerald Lefcourt & William Murphy, *Justice That Makes Sense*, The Champion (Nat'l Ass'n of Crim. Def. Lawyers, D.C.), Dec. 1997 (representing the views of the Chair of the Criminal Justice Section of the ABA, the President of the National Association of Criminal Defense Lawyers, and the President of the National District Attorneys Association) ("There can be little doubt that increased federal prosecutive authority has adversely affected the Department of Justice's ability to fulfill its role of enforcing traditional federal offenses; it has overwhelmed federal courts with matters best handled in state venues; it has a major impact on the federal correctional system . . . .").

Compared to the state court systems, there are relatively few federal judges. In 2011, there were 27,570 state trial court judges and 1,336 state appellate court judges. *See* Bureau of Justice Statistics, U.S. Dep't of Justice, *State Court Organization, 2011*, tbl. 2 (2013). In stark contrast, there were only 677 authorized judgeships for the federal district courts and only 167 for the federal courts of appeals in 2012. *See* 2012 Judicial Business of the U.S. Courts, tbls. 1, 3. That year, a total of 94,121 defendants were prosecuted in federal district courts, representing twenty-five percent of all cases filed in the district courts. *Id.* tbl. D. Even more significantly, criminal cases accounted for fifty-nine percent of all trials in the district courts. *Id.* tbl. T-1. Similarly, criminal cases represented nearly twenty-four percent of the appeals filed in federal courts of appeals. *Id.* tbl. B1-A. Considering the small size of the federal judiciary, the rising number of federal prosecutions threatens the federal courts' ability to devote sufficient resources to the fulfillment of their core functions, including enforcing federal constitutional and statutory rights and handling cases of national importance.

The Tenth Circuit's unduly broad reading of the federal bank fraud statute would only further burden the federal courts by making them a venue for prosecution of petty crimes better handled through state prosecutions. *See generally* 1998 Year-End Report ("Federal courts were not created to adjudicate local crimes . . . . State courts do, can, and should handle such problems.").

B. Overlapping State and Federal Jurisdiction Leads to Competition and Inefficiencies in the Administration of Criminal Justice

Expanding federal criminal jurisdiction to cover conduct traditionally prosecuted by the states also creates counterproductive competition between state and federal law enforcement and leads to the ineffective duplication of resources when state and federal crimes overlap.

Those most familiar with the effects of expanding federal crimes have repeatedly warned of the inefficiencies created by over-federalization. According to the Conference of Chief Justices, which reflects the views of the nation's state judges, the "'federalization of criminal law is a mounting concern of the state judiciary'" because it results in "'the needless disruption of effective state and local enforcement efforts.'" ABA Task Force at 41-42 (quoting Resolution IX, Conference of Chief Justices, Feb. 10, 1994). Similarly, the National Governors Association counseled that "'some attempts to expand federal criminal law into traditional state function would have little effect in eliminating crime, but could undermine state and local anticrime efforts.'" *Id.* at 42 (quoting National Governors Association Policy HR-19, "Federalism and Criminal Justice").

Prosecutors and defense attorneys agree that overlapping criminal jurisdiction can be ineffective and undesirable. *See, e.g.*, John S. Baker, Jr., *State Police Powers and the Federalization of Local Crime*, 72 Temp. L. Rev. 673, 677 n.26 (1999) ("'The National District Attorneys Association has long opposed the unwarranted federalization of crime in the belief that it works to the detriment of the efficient and effective

use of our law enforcement and legal resources.'" (quoting Letter from William J. Murphy, then-President of the Nat'l Dist. Att'ys Ass'n, to Prof. James Strazella, ABA Task Force (Oct. 17, 1997))); *id.* ("'Federalization can inappropriately displace state policy and . . . political accountability is impaired when decisions are moved from the state to the federal level.'" (quoting Letter from Elizabeth Alexander, then-Director of the ACLU, to Edwin Meese, III, Chair, ABA Task Force (Feb. 25, 1998))).

C. Federalizing Crimes Already Prosecuted by the States Does Little To Alleviate Crime and Undermines the Vital Role of the States in Prosecuting Crime

The expansion of federal criminal law also undermines the role of the states in the administration of criminal justice. Giving the federal government the power to prosecute conduct that is already being prosecuted by the states without explaining the need for federal interference can lead to a perception by the general public that state prosecutors and courts are not capable of adequately handling important criminal matters. *See, e.g.*, ABA Task Force at 41-42 ("'Congress has for more than a decade shown a strong tendency to denigrate the state role in addressing crime and to inject federal agencies into the realm of state criminal law.'" (quoting Resolution IX, Conference of Chief Justices, Feb. 10, 1994)).

In reality, however, state courts remain the primary forum for criminal prosecutions. Federal courts account for only six percent of all felony convictions nationwide. *See* Bureau of Justice Statistics, U.S. Dep't of Justice, *Felony Sentences in*

State Courts, 2004, at 1 (2007). Consequently, increasing the number of offenses subject to federal prosecution is unlikely to have any significant effect on reducing or controlling the types of violent crime that most concern the public.

Furthermore, even if federal courts could handle a larger percentage of criminal prosecutions, state courts remain better equipped to preside over most criminal cases. Given the substantially greater number and geographic diversity of state courts, it is usually easier for defendants, victims, witnesses, and jurors to attend state court proceedings. Additionally, because state courts have historically had larger and more diverse criminal dockets, many have developed a wide range of social services, outreach programs, and alternative-sentencing programs, which are lacking in the federal system.

Finally, leaving the states to define and prosecute local crime promotes many of the important practical advantages of federalism. It promotes political accountability in criminal law, ensures that criminal justice policies are narrowly tailored to local communities, and permits useful experimentation in the administration of criminal justice. *See generally* Jeffrey S. Sutton, *An Appellate Perspective on Federal Sentencing After* Booker *and* Rita, 85 Denv. U. L. Rev. 79, 91 (2007) ("It is one thing for a state such as Ohio to develop criminal laws and ranges of criminal punishments for 11.4 million people who live within 41 thousand square miles; it is quite another for Congress to undertake the same task for 299 million people who live within 3.5 million square miles. . . . Criminal law experiments unleashed on 300 million people are as difficult to implement and monitor as they are to change.").

D. Over-Federalization Leads to the Disparate Treatment of Similarly Situated Defendants

The creation of new federal crimes has a significant effect on the fairness of the criminal justice system. Expanding the scope of federal criminal law to cover conduct that is already criminalized by state law creates areas of dual criminal jurisdiction in which identical conduct may be prosecuted in both state and federal courts. The result is a system in which defendants who engage in nearly identical conduct may receive substantially different treatment depending on where they are prosecuted.

Even for the most frequently prosecuted federal offenses—those relating to drugs—the vast majority of such crimes are still prosecuted in state courts. For example, in 2004, there were 1,745,712 arrests for drug offenses nationwide, but only 32,980 of these were for federal offenses. *See* University of Albany, *Sourcebook of Criminal Justice Statistics*, tbls. 4.1, 4.33 (2004). In other words, while drug offenses accounted for almost twenty-five percent of all federal arrests that year (and more than thirty-five percent of all federal prosecutions), less than two percent of the nation's drug arrests were handled in federal court. *See* Bureau of Justice Statistics, U.S. Dep't of Justice, *Compendium of Federal Justice Statistics, 2004*, tbl. 2.2 (2006). As a consequence of the federal government's decision not to prosecute the vast majority of offenses that now fall within its jurisdiction, only a small subset of individuals who could be charged with a federal crime are prosecuted in federal court.

The decision to bring charges in federal rather than state court is left entirely to prosecutors' discretion, with little guidance or oversight. The United States Attorneys' Manual, which is intended to provide standards for the exercise of prosecutorial discretion, lacks clear guidelines for many criminal offenses. For example, for the federal bank fraud statute at issue here, the Manual states only that "[t]he choice of offenses charged should be based on the facts of the individual case," without any further guidance on when federal versus state prosecution is appropriate. U.S. Dep't of Justice, United States Attorneys' Manual § 9-40.826.

Such unfettered prosecutorial discretion increases the danger of prosecuting similarly situated defendants—in some instances, even accomplices to the same offense—in different courts, with vastly different consequences, without sufficient justification for the disparate treatment. *See, e.g.*, Sara Sun Beale, *Too Many and Yet Too Few: New Principles To Define the Proper Limits for Federal Criminal Jurisdiction*, 46 Hastings L.J. 979, 998-99 (1995) (collecting cases in which similarly situated defendants, including co-defendants, received vastly different sentences based on where they were prosecuted).

The decision to bring a case in federal rather than state court has significant consequences. Depending on the jurisdiction, a federal prosecution may involve a more powerful grand jury system, a lower standard for the approval of search warrants, a lower burden of proof to justify a wiretap, and more restricted discovery of the government's case. *See* Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54

Am. U. L. Rev. 747, 768-69 (2005) (citing to federal and state procedural rules). And, as illustrated by this case, the federal and state sentencing laws often differ substantially.

IV. THE UNJUSTIFIED SEVERITY OF PETITIONER'S SENTENCE ILLUSTRATES THE DANGERS OF OVER-FEDERALIZATION

By allowing a federal bank fraud conviction without any proof of intent to defraud a bank, the Tenth Circuit has wrongly converted a relatively minor, local crime into a federal offense that carries substantially more severe penalties than its state-law equivalents.

The petitioner in this case used six altered checks totaling $1,184.58. Apart from using checks, most of which were never even submitted to a financial institution, petitioner's crime had no nexus to a bank or to any other federally regulated institution and did not implicate any uniquely federal interests. Petitioner's conduct is a prime example of the type of purely local crime that state courts are best equipped to handle and which the constitutional balance between the state and federal governments suggests should belong within state criminal jurisdiction.

Because the prosecutors chose to charge petitioner in federal court, however, he received a sentence that was significantly higher than what he would have received had he been prosecuted in state court. Petitioner was sentenced to thirty-six months of imprisonment: twelve months for his federal bank fraud convictions and an additional twenty-four months for his convictions of aggravated identify theft. The length of his sentence was a direct result of several substantive provisions that are unique to the

federal criminal code and that would not have applied in state court. First, Section 1344 is a predicate for aggravated identity theft, 18 U.S.C. § 1028A, which carries a mandatory minimum sentence of two years. The U.S. Code further requires that the mandatory minimum sentence run consecutively to the terms of imprisonment imposed for any other crimes, except other Section 1028A convictions. In this case, petitioner's Section 1344 conviction was the only predicate act for his conviction under Section 1028A. In other words, had the courts properly interpreted the federal bank fraud statute as not extending to the conduct at issue here, petitioner would not have been subject to the mandatory consecutive two-year sentence.

A defendant convicted in state court for conduct that is substantially similar to petitioner's crime would receive a significantly shorter sentence. For example, in Utah, where the crime occurred, a defendant with no criminal history who was convicted of forging checks for more than $1,000 but less than $5,000 would have a recommended sentence of only nine months—more than two years shorter than the sentence petitioner received in federal court. *See* Utah Code Ann. § 76-6-501 (defining crime of forgery and producing false identification); Utah Sentencing Comm'n, *Adult Sentencing and Release Guidelines* 11 (2013).

Petitioner received these severe penalties without any indication from Congress that it intended to subject individuals accused of such minor local crimes to federal prosecution. Affirming the Tenth Circuit's holding would permit the continued disparate treatment of similarly situated defendants and subject countless others to the same inappropriately

harsh consequences without a decision by Congress that expanding federal bank fraud is warranted or necessary.

CONCLUSION

For the reasons discussed above and in the Petitioner's brief, the judgment of the Tenth Circuit should be reversed.

Respectfully submitted,

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